1879
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Postponed to 148

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~339~~. 110

THE NORTHWESTERN UNION PACKET COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF ST. LOUIS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED FEBRUARY 26, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 339.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, at the September term, 1877, thereof, between The Northwestern Union Packet Company, plaintiff, against The City of St. Louis, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 26th day of January, in the year of our Lord one thousand eight hundred and seventy-seven.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[SEAL.]

M. M. PRICE,
Clerk Circuit Court United States, Eastern District of Missouri,
By A. P. SELBY,
Deputy.

Allowed by—

SAMUEL TREAT,
Judge.

b *Return to writ.*

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the *the* record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at office in the city of St. Louis, this 2d day of February, A. D. 1877.

[SEAL.]

M. M. PRICE,
Clerk of said Court,
By A. P. SELBY,
Deputy.

c The United States of America to the City of St. Louis, greeting: You are hereby cited and admonished to be and appear at a Supreme

Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein The Northwestern Union Packet Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri, this 26th day of January, in the year of our Lord one thousand eight hundred and seventy-seven.

SAMUEL TREAT,
Judge United States Circuit Court, Eastern District of Missouri.

Due & legal service of this citation acknowledged.

E. T. FARISH,
City Counsellor.

(Indorsed :) United States circuit court eastern district of Missouri. Northwestern Union Packet Company, P. E., vs. The City of St. Louis, D. E.

1 THE UNITED STATES OF AMERICA,
Eastern District of Missouri, set :

Be it remembered, that heretofore, to wit, on the 30th day of September, A. D. 1875, there was filed in the office of the clerk of the circuit court of the United States for the eastern district of Missouri, a certain petition; which said petition is in words and figures following, to wit:

Petition.

In the circuit court of the United States for the eastern district of Missouri, March term, 1876.

THE NORTHWESTERN UNION PACKET COMpany, plaintiff,
against
THE CITY OF ST. LOUIS, DEFENDANT.

The plaintiff herein respectfully states and alleges:

I. That the plaintiff, The Northwestern Union Packet Company, is an incorporated company, organized and incorporated under and by virtue of the fifty-second chapter of the "Revision of 1860," of the laws of the State of Iowa, entitled "Incorporations for pecuniary profit," and that it is a citizen of the State of Iowa, and during all the times herein mentioned, plaintiff was engaged in the business of commerce and navigation as a common carrier upon the waters of the Mississippi River and its tributaries, and between ports and places in different States of the United States.

II. That during all the times herein mentioned, plaintiff owned and employed in such business the steamboats Addie Johnston, Annie Johnston, Alexander Mitchell, Belle of La Crosse, City of Quincy, City of St. Paul, Damsel, Dexter, G. H. Wilson, Hudson, Jennie Baldwin, Keokuk, Mankato, Milwaukee, Mollie Mohler, Mollie McPike, Northwestern, Tom

Jasper, Phil. Sheridan, S. S. Merrill, Victory, and a large number of barges.

III. That each of said steamboats and barges mentioned, were of more than twenty tons burthen, and that they were each, while so em-
2 ployed, and during all the times herein mentioned, duly enrolled and licensed for the coasting trade under and by virtue of the laws of the United States of America, and in conformity to the several acts of Congress passed for the regulation of commerce and navigation.

IV. That the defendant, The City of St. Louis, is, and at the times herein mentioned was, a municipal corporation, existing under and by virtue of the laws of the State of Missouri, and that it is a citizen of said State.

V. That during the years 1870 and 1871 and 1872, steamboats and barges owned or employed by said plaintiff, in the prosecution of the business of said plaintiff, as a common carrier, did arrive at and land at said city of Saint Louis, and that large sums of money, from time to time, were illegally demanded of said plaintiff, and were illegally received by said defendant from said plaintiff as wharfage for said steamboats and barges, and that plaintiff was compelled under duress to pay, and did pay under protest against the legality of such wharfage tax, a large amount of money as wharfage for the steamboats and barges belonging to and employed by plaintiff in its said business; the several amounts of which, with the dates of payment, and the names of the vessels from or on account of which such wharfage was collected, will more fully and particularly appear by reference to Exhibit A, hereto attached and made part of this complaint.

VI. That the several sums of money set forth in Exhibit A were all collected under and by virtue of certain ordinances of the said city of Saint Louis.

VII. That said ordinances were and are illegal and void, and in violation of the Constitution and laws of the United States, and that the wharfage tax demanded and received thereunder was wrongfully and unlawfully exacted, and that this plaintiff was compelled under duress to pay such wharfage; and plaintiff did protest against the payment thereof, and gave notice to defendant that such payments were
3 made under protest, and without waiving the right of plaintiff to recover the same from defendant by an action at law.

VIII. That during the years 1870, 1871, and 1872, the plaintiff was compelled under duress to pay and did pay to defendant, under protest, as wharfage for the several steamboats and barges named in Exhibit A, the several sums set forth therein, and at the dates therein mentioned, amounting in the aggregate to the sum of ($6,778 $\frac{95}{100}$) six thousand seven hundred and seventy-eight $\frac{95}{100}$ dollars.

Wherefore, plaintiff demands judgment against defendant for the sum of ($6,778 $\frac{95}{100}$) six thousand seven hundred and seventy-eight $\frac{95}{100}$ dollars, with interest on the sum of ($3,431.41) three thousand four hundred and thirty-one $\frac{41}{100}$ dollars, from November first, A. D. 1870; and with interest on the sum of ($3,096.85) three thousand and ninety-six $\frac{85}{100}$ dollars, from November first, A. D. 1871; and with interest on the sum of ($250 $\frac{70}{100}$) two hundred and fifty $\frac{70}{100}$ dollars, from November first, A. D 1872, together with the costs and disbursements of this action.

D. D. DUNCAN and
J. HAM DAVIDSON,
Attorneys for Plaintiff.

And the said Exhibit A, referred to in said petition, is in words and figures following, to wit:

4 *Wharfage paid at port of Saint Louis, Missouri.*

Month.	Day.	Year.	Name of vessel.	Am't paid.
December	9	1870	Damsell and barges Vone and Annie	33 25
January	7	1870	Victory	19 45
March	7	1870	Victory	28 65
March	28	1870	Victory	27 55
April	9	1870	Victory	27 55
December	10	1870	Victory	19 45
January	17	1870	Tom Jasper	41 40
March	15	1870	Tom Jasper	41 40
April	1	1870	Tom Jasper	41 40
April	18	1870	Tom Jasper	60 15
April	30	1870	Tom Jasper	41 40
May	11	1870	Tom Jasper	41 40
May	25	1870	Tom Jasper	41 40
June	6	1870	Tom Jasper	41 40
June	17	1870	Tom Jasper	50 90
June	29	1870	Tom Jasper	41 40
July	5	1870	Tom Jasper	53 55
July	14	1870	Tom Jasper	49 55
July	18	1870	Tom Jasper	31 00
July	23	1870	Tom Jasper	49 75
July	24	1870	Tom Jasper	41 40
July	25	1870	Tom Jasper, barge Roanoke	11 60
July	27	1870	Tom Jasper	39 10
August	1	1870	Tom Jasper	31 00
August	5	1870	Tom Jasper	31 00
August	9	1870	Tom Jasper	31 00
August	15	1870	Tom Jasper	31 00
			Am't carried forward	$998 10
5			Am't bro't forward	998 10
August	19	1870	Tom Jasper	31 00
October	20	1870	Tom Jasper	49 80
May	16	1870	Mollie McPike	24 75
May	26	1870	Mollie McPike	24 75
September	12	1870	Mollie McPike	24 75
September	30	1870	Mollie McPike	24 75
October	7	1870	Mollie McPike	24 75
November	2	1870	Mollie McPike	51 90
November	23	1870	Mollie McPike	44 10
November	30	1870	Mollie McPike	44 00
April	22	1870	Alexander Mitchell	27 70
May	5	1870	Alexander Mitchell	27 70
May	17	1870	Alexander Mitchell	27 70
May	30	1870	Alexander Mitchell	39 85
June	10	1870	Alexander Mitchell	27 70
June	21	1870	Alexander Mitchell	27 70
September	12	1870	Alexander Mitchell	27 70
September	26	1870	Alexander Mitchell	27 70
October	10	1870	Alexander Mitchell	27 70
October	22	1870	Alexander Mitchell	38 65
November	4	1870	Alexander Mitchell	50 45
November	21	1870	Alexander Mitchell	48 35
April	18	1870	Milwaukee	24 50
May	23	1870	Belle of La Crosse	25 25
June	3	1870	Belle of La Crosse	25 25
June	14	1870	Belle of La Crosse	25 25
June	27	1870	Belle of La Crosse	25 25
			Am't carried forward	$1,867 05
6			Am't brought forward	1,867 05
September	7	1870	Belle of La Crosse	32 75
October	3	1870	Belle of La Crosse	25 25
October	15	1870	Belle of La Crosse	34 50
October	28	1870	Belle of La Crosse	42 60
November	11	1870	Belle of La Crosse	25 25
November	19	1870	Belle of La Crosse	34 85
November	25	1870	Belle of La Crosse	25 25
April	2	1870	Phil Sheridan	28 75
April	13	1870	Phil Sheridan	28 75
April	25	1870	Phil Sheridan	28 75
May	7	1870	Phil Sheridan	28 75
May	19	1870	Phil Sheridan	28 70
May	31	1870	Phil Sheridan	28 70
June	13	1870	Phil Sheridan	39 55
June	24	1870	Phil Sheridan	28 75
July	5	1870	Phil Sheridan	28 75
July	12	1870	Phil Sheridan	28 75
July	16	1870	Phil Sheridan	48 9

Wharfage paid at port of Saint Louis, Missouri.

	Month.	Day.	Year.	Name of vessel.	Am't paid.
	July	21	1870	Phil Sheridan	49 30
	July	25	1870	Phil Sheridan	32 35
	July	30	1870	Phil Sheridan	21 60
	August	3	1870	Phil Sheridan	21 60
	August	8	1870	Phil Sheridan	21 60
	August	12	1870	Phil Sheridan	21 60
	August	17	1870	Phil Sheridan	21 60
	August	22	1870	Phil Sheridan	21 60
	August	25	1870	Phil Sheridan	27 90
				Am't carried forward	$2,673 80
7				Am't brought forward	2,673 80
	August	29	1870	Phil Sheridan	27 90
	September	1	1870	Phil Sheridan	27 60
	September	16	1870	Phil Sheridan	38 25
	September	28	1870	Phil Sheridan	38 25
	October	12	1870	Phil Sheridan	38 25
	October	26	1870	Phil Sheridan	38 35
	November	9	1870	Phil Sheridan	37 75
	November	14	1870	Phil Sheridan	21 60
	April	22	1870	Northwestern	42 95
	May	3	1870	Northwestern	31 35
	May	14	1870	Northwestern	31 35
	May	28	1870	Northwestern	54 15
	June	7	1870	Northwestern	31 35
	June	20	1870	Northwestern	39 75
	July	1	1870	Northwestern	31 35
	September	7	1870	Northwestern	31 35
	September	20	1870	Northwestern	31 35
	October	4	1870	Northwestern	31 35
	October	17	1870	Northwestern	48 85
	November	1	1870	Northwestern	53 25
	November	14	1870	Northwestern	31 35
					$3,431 40
8	March	25	1871	Mollie McPike	16 50
	April	7	1871	Mollie McPike	16 50
	September	25	1871	Victory	12 95
	September	25	1871	Barge Sultana	7 15
	September	25	1871	Barge Franc	6 35
	October	6	1871	Victory	12 95
	October	6	1871	Barge Hastings	8 90
	October	6	1871	Barge Franc	6 35
	October	11	1871	Victory	12 95
	October	11	1871	Barge J. H. Reaney	7 30
	October	11	1871	Barge Franc	6 35
	October	18	1871	Victory	12 95
	October	18	1871	Barge J. H. Reaney	7 30
	October	18	1871	Barge Franc	6 35
	October	24	1871	Victory	12 95
	October	24	1871	Barge Franc	6 35
	October	24	1871	Barge J. H. Reaney	7 30
	October	30	1871	Victory	12 95
	October	30	1871	Barge J. H. Reaney	7 10
	October	30	1841	Barge Franc	6 35
	November	4	1871	Victory	12 95
	November	4	1881	Barge Franc	6 35
	November	4	1871	Barge J. H. Reaney	7 30
	November	10	1871	Victory	12 95
	November	10	1871	Barge Franc	6 35
	November	10	1871	Barge J. H. Reaney	7 30
	May	26	1871	Jennie Baldwin	32 65
				Am't carried forward	$279 70
9				Am't brought forward	$279 70
	June	5	1871	Jennie Baldwin	14 55
	June	5	1871	Barge Ocean	6 15
	June	5	1871	Barge St. Paul	5 60
	March	28	1871	Belle of La Crosse	16 85
	April	10	1871	Belle of La Crosse	16 85
	April	24	1871	Belle of La Crosse	16 85
	May	6	1871	Belle of La Crosse	16 85
	May	19	1871	Belle of La Crosse	16 85
	May	30	1871	Belle of La Crosse	6 25
	May	30	1871	Belle of La Cresse	16 85
	June	8	1871	Belle of La Crosse	16 85
	June	19	1871	Belle of La Crosse	16 85

Wharfage paid at port of Saint Louis, Missouri.

Month.	Day.	Year.	Name of vessel.	Am't paid.
July	1	1871	Belle of La Crosse	16 85
April	14	1871	S. S. Merrill	26 25
April	28	1871	S. S. Merrill	26 25
May	9	1871	S. S. Merrill	26 25
May	20	1871	S. S. Merrill	26 25
May	20	1871	Barge Duke	12 50
May	30	1871	S. S. Merrill	26 25
May	30	1871	Barge E. R. Paul	7 30
June	10	1871	S. S. Merrill	26 25
June	10	1871	Barge E. R. Paul	7 30
June	22	1871	S. S. Merrill	26 25
July	3	1871	S. S. Merrill	26 25
July	11	1871	S. S. Merrill	26 25
July	15	1871	S. S. Merrill	26 25
July	18	1871	S. S. Merrill	26 25
			Am't carried forward	$779 75
10			Am't brought forward	$779 75
July	22	1871	S. S. Merrill	26 25
July	25	1871	S. S. Merrill	26 25
July	28	1871	S. S. Merrill	26 25
August	2	1871	S. S. Merrill	26 25
August	7	1871	S. S. Merrill	26 25
August	10	1871	S. S. Merrill	26 25
August	12	1871	S. S. Merrill	26 25
August	17	1871	S. S. Merrill	26 25
August	21	1871	S. S. Merrill	26 25
August	21	1871	Barge Victory	9 00
August	24	1871	S. S. Merrill	26 25
August	28	1871	S. S. Merrill	26 25
August	28	1871	Barge R. E. Lee	8 95
August	31	1871	S. S. Merrill	26 25
September	12	1871	S. S. Merrill	26 25
September	12	1871	Barge Franc	6 35
October	5	1871	S. S. Merrill	26 25
October	5	1871	Barge Duke	12 50
October	5	1871	Barge Duke	12 50
October	25	1871	S. S. Merrill	26 25
October	25	1871	Barge St. Paul	5 60
October	25	1871	Barge No. 2	12 60
November	20	1871	S. S. Merrill	26 25
November	20	1871	Barge Duke	8 15
April	11	1871	Tom Jasper	27 60
August	28	1871	Tom Jasper	27 60
October	10	1871	Tom Jasper	27 60
			Am't carried forward	$1,358 20
11			Am't brought forward	1,358 20
October	10	1871	Barge St. Paul	5 60
November	7	1871	Tom Jasper	27 60
November	7	1871	Barge Sawyer	7 55
March	27	1871	Alexander Mitchell	18 45
April	17	1871	Alexander Mitchell	18 45
May	1	1871	Alexander Mitchell	18 45
May	12	1841	Alexander Mitchell	18 45
May	22	1871	Alexander Mitchell	18 45
June	1	1871	Alexander Mitchell	18 45
June	1	1871	Barge	7 90
June	12	1871	Alexander Mitchell	18 45
July	23	1871	Alexander Mitchell	18 45
July	4	1871	Alexander Mitchell	18 45
February	13	1871	Northwestern	20 90
March	11	1871	Northwestern	20 90
March	20	1871	Northwestern	20 90
April	3	1871	Northwestern	20 90
April	3	1871	Barge D. Hewett	9 55
April	17	1871	Northwestern	20 90
May	2	1871	Northwestern	20 90
May	2	1871	Barge Saint Paul	5 60
May	15	1871	Northwestern	20 90
May	25	1871	Northwestern	20 90
June	5	1871	Northwestern	20 90
June	15	1871	Northwestern	20 90
June	26	1871	Northwestern	20 90
			Am't carried forward	$1,817 95
12			Am't brought forward	1,817 95

Wharfage paid at port of Saint Louis, Missouri.

Month.	Day.	Year.	Name of vessel.	Am't paid.
July	6	1871	Northwestern	20 90
July	10	1871	Northwestern	20 90
July	13	1871	Northwestern	20 90
July	17	1871	Northwestern	20 90
July	20	1871	Northwestern	20 90
July	24	1871	Northwestern	20 90
July	27	1871	Northwestern	20 90
July	31	1871	Northwestern	20 90
July	31	1871	Barge Ocean	6 15
August	4	1871	Northwestern	20 90
August	4	1871	Barge Ocean	6 15
August	9	1871	Northwestern	20 90
August	9	1871	Barge Saint Paul	5 60
August	12	1871	Northwestern	20 90
August	16	1871	Northwestern	20 90
August	19	1871	Northwestern	20 90
August	23	1871	Northwestern	20 90
August	23	1871	Barge Border State	6 90
August	26	1871	Northwestern	20 90
August	26	1871	Barge Ocean	6 15
August	30	1871	Northwestern	20 90
September	2	1871	Northwestern	20 90
September	2	1871	Barge M. Kraimer	10 40
September	5	1871	Northwestern	20 90
September	11	1871	Northwestern	20 90
September	11	1871	Barge R. E. Lee	8 95
			Am't carried forward	$2,265 35
13			Am't brought forward	2,265 35
September	16	1871	Northwestern	20 90
September	16	1871	Barge D. Remor	2 50
September	16	1871	Barge Hastings	8 90
September	21	1871	Northwestern	20 90
September	21	1871	Barge Hastings	8 90
September	21	1871	Barge Saint Paul	5 60
September	25	1871	Northwestern	20 90
September	25	1871	Barge Saint Louis	5 40
September	25	1871	Barge Natches	9 00
September	30	1871	Northwestern	20 90
September	30	1871	Barge Mist	6 20
September	30	1871	Barge Natches	9 00
October	4	1871	Northwestern	20 90
October	4	1871	Barge Natches	9 00
October	4	1871	Barge Mist	6 20
October	9	1871	Northwestern	20 90
October	9	1871	Barge Mist	6 20
October	9	1871	Barge Natches	9 00
October	14	1871	Northwestern	20 90
October	14	1871	Barge Natches	9 00
October	14	1871	Barge Mist	6 20
October	20	1871	Northwestern	20 90
October	20	1871	Barge Natches	9 00
October	20	1871	Barge Mist	6 20
October	26	1871	Northwestern	20 90
October	26	1871	Barge Natches	9 00
October	26	1871	Barge Mist	6 20
			Am't carried forward	$2,584 95
14			Am't brought forward	2,584 95
November	1	1871	Northwestern	20 90
November	1	1871	Barge Natches	9 00
November	6	1871	Northwestern	20 90
November	6	1871	Barge Natches	9 00
November	6	1871	Barge Mist	6 20
November	13	1871	Northwestern	20 90
November	13	1871	Barge Mist	6 20
November	20	1871	Northwestern	20 90
April	26	1871	Phil Sheridan	19 15
May	8	1871	Phil Sheridan	19 15
June	5	1871	Phil Sheridan	12 50
June	14	1871	Phil Sheridan	19 15
April	3	1871	City of Quincy	34 45
April	21	1871	City of Quincy	34 45
June	28	1871	City of Quincy	34 45
July	19	1871	City of Quincy	34 45
August	10	1871	City of Quincy	34 45
August	31	1871	City of Quincy	34 45
October	4	1871	City of Quincy	34 45
October	4	1871	Barge R. E. Lee	8 95
October	31	1871	City of Quincy	34 45

Wharfage paid at port of Saint Louis, Missouri.

Month.	Day.	Year.	Name of vessel.	Am't paid.
October	31	1871	Barge R. E. Lee	$ 95
November	28	1871	City of Quincy	34 45
				3,096 85
15 January	10	1872	S. S. Merrill	26 25
January	25	1872	S. S. Merrill	26 25
March	22	1872	S. S. Merrill	26 25
March	22	1872	Barge R. E. Lee	8 85
March	22	1872	Barge Saint Paul	5 60
March	9	1872	Northwestern	20 90
March	5	1872	Tom Jasper	27 60
March	29	1872	Tom Jasper	27 60
February	26	1872	City of Quincy	34 45
Februar	26	1872	Barge Duchess	12 50
March	19	1872	City of Quincy	34 45
				$250 70

MEMORANDA.

1870	$3,431 40
1871	3,096 85
1872	250 70
Total	$6,778 95

And afterwards, to wit, on the 5th day of October, 1875, the clerk of said court issued a summons, which is in the words and figures following, to wit:

Summons.

UNITED STATES OF AMERICA,
Eastern District of Missouri, set:

In the circuit court of the United States in and for said district.

The President of the United States of America to the marshal of the United States in and for said district, greeting:

You are hereby commanded to summon the City of Saint Louis, a municipal corporation and citizen of the State of Missouri, that it be and appear before the honorable circuit court of the United States in and for the eastern district of Missouri, on the first day of the next term thereof, to be holden at the city of St. Louis, in and for said district, on the third Monday of March next, then and there to answer the complaint of The North Western Union Packet Company, a citizen of the State of Iowa, as set forth in the petition filed in said court on the 30th day of September, A. D. eighteen hundred and seventy-five.

Hereof fail not, and have you then and there this writ.

Witness, the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 5th day of October, A. D. eighteen hundred and seventy-five. Issued at office in the city of St. Louis, under the seal of said circuit court the day and year last aforesaid.

[SEAL.] M. M. PRICE, *Clerk*,
By A. P. SELBY, *Deputy*.

And endorsed on said summons is the marshal's return, in words and figures following, to wit:

Return.

UNITED STATES OF AMERICA,
Eastern District of Missouri, set:

I executed the within summons by delivering a certified copy of the same, and a copy of the petition to Hon. James H. Britton, mayor
17 of the city of St. Louis, at St. Louis, in said district, Nov. 9th, 1875.

CARMAN A. NEWCOMB,
U. S. Marshal E. D. Mo.,
By WM. H. BIERSTADT, *Deputy.*

And afterwards, to wit, at a regular term of the circuit court of the United States for the eastern district of Missouri, begun and holden on the third Monday, the 20th day of March, 1876, the defendant filed its answer to plaintiff's petition, which said answer is in words and figures following, to wit:

Answer.

In the circuit court of the United States for the eastern district of Missouri.

THE NORTHWESTERN UNION PACKET COMPANY, plaintiff,
v.
THE CITY OF ST. LOUIS, DEFENDANT.

Now comes said defendant & for answer to the petition & complaint of plaintiff herein, denies that plaintiff is an incorporated company, & denies that plaintiff was organized or incorporated as stated in plaintiff's petition, or in any other manner, & denies that plaintiff is or was a citizen of the State of Iowa, & denies that plaintiff is or was at any time engaged in the business of commerce or navigation, as a common carrier, or otherwise upon the water of the Mississippi River and its tributaries, or elsewhere, or between ports and places in different States of the United States.

Denies that plaintiff at the times alleged in said petition, or at any time, owned or employed the steamboats Addie Johnston, Annie Johnston, Alexander Mitchell, Belle of La Crosse, City of Quincy, City of St. Paul, Damsel, Dexter, G. H. Wilson, Hudson, Jennie Baldwin, Keokuk, Mankato, Milwaukee, Mollie Mohler, Mollie McPike, Northwestern, Tom Jasper, Phil. Sheridan, S. S. Merrill, and Victory, or any of them, or that plaintiff owned or employed a large or any number of barges.

Denies that said steamboats or barges, or any of them, were of
18 more than twenty tons burthen, and denies that they, or any of them, were enrolled or licensed under or by virtue of the laws of the United States.

Admits that defendant is a municipal corporation under the laws of Missouri, and a citizen of that State.

Denies that during the years 1870, 1871, and 1872, or at any other time, any steamboats or barges owned or employed by plaintiff, did arrive at or land at the city of St. Louis, and denies that from time to time, or at any time, large or any sums of money were illegally or in any manner demanded of plaintiff, or were illegally or in any manner received by

defendant from plaintiff as wharfage; and denies that plaintiff was compelled under duress, or otherwise, to pay, or that plaintiff did pay under protest against the legality of any wharfage tax, or in any manner, or large, or any amount of money, as wharfage or otherwise, for steamboats or barges belonging to or employed by plaintiff.

And as to Exhibit A attached to the complaint or petition in this case, defendant denies each and every item thereof, and states that said Exhibit A is untrue in every particular and in every item thereof.

Denies that the several sums of money set forth in Exhibit A, or any sums of money, were collected under or by virtue of any ordinances of the city of St. Louis.

Denies that any ordinances of the city of St. Louis were or are illegal or void, or in violation of the Constitution or laws of the United States; and denies that any wharfage tax was wrongfully or unlawfully exacted or demanded, or received, under any ordinance of the city of St. Louis; and denies that plaintiff was compelled under duress, or did pay under duress to the city of St. Louis any wharfage whatsoever; and denies that plaintiff protested against such payment, or gave notice to defendant that such payments were made under protest or without waiving the right of plaintiff to recover the same from defendant by an action
19 at law, or in any manner.

Denies that during the years 1870, 1871, and 1872, plaintiff was compelled under duress to pay, or did pay to defendant, under protest, or in any manner as wharfage for the steamboats and barges named in Exhibit A, or any steamboats or barges, the several sums set forth in Exhibit A, or any sums whatsoever, at the dates therein mentioned, or at any other dates, amounting in the aggregate to $\$6{,}778\frac{95}{100}$, or any other sum whatsoever.

Denies that plaintiff is entitled to any judgment herein whatsoever, and having fully answered, defendant prays hence to be dismissed with costs, &c.

LEVERETT BELL,
For Def't.

And afterwards, at a regular term of said circuit court, begun and held on the third Monday, the 18th day of September, 1876, the following proceedings were had in this cause on the 3rd day of October, 1876, to wit:

Cause submitted.

NORTHWESTERN UNION PACKET CO., PLAINTIFF,
vs.
CITY OF ST. LOUIS, DEFENDANT.

Now come the said parties by their attorneys, and file stipulation as to certain facts, and cause submitted to the court; and thereupon plaintiff, by its attorney, files brief, and leave granted defendant to file brief on or before October 15th, the plaintiff to reply on or before October 25th.

And afterwards, at an adjourned day of said circuit court, held on the 8th day of January, 1877, the following further proceedings were had in this cause, to wit:

Judgment.

THE NORTHWESTERN UNION PACKET COMpany, plaintiff,
vs.
THE CITY OF SAINT LOUIS, DEFENDANT.

Now come the said parties by their attorneys, the plaintiff by D. D. Duncan, esquire, and the defendant by E. T. Farish, esquire, and
20 this cause having been heretofore submitted to the court for trial, a jury being waived by stipulation, upon the pleadings, proofs, and briefs of counsel, and the court being now fully advised in the premises, finds the issues for the defendant.

It is therefore now considered by the court that the said plaintiff take nothing by its writ herein; that the defendant, the City of Saint Louis, go hence without day, and have and recover against the plaintiff, The Northwestern Union Packet Company, its costs in this behalf expended, and have thereof execution.

And afterwards, at said adjourned term of said circuit court, and on the 9th of January, 1877, the plaintiff filed its motion for a new trial herein, which is in words and figures as follows, to wit:

Motion for new trial.

In the circuit court of the United States for the eastern district of Missouri, September term, 1876.

NORTHWESTERN UNION PACKET COMPANY, pl'ff,
vs.
THE CITY OF ST. LOUIS, DEF'T.

Now at this day comes the plaintiff and moves the court to grant a new trial in this cause, because the finding of the court upon the agreed statement of facts is contrary to the law.

By its attorney, D. D. DUNCAN.

And afterwards, at said adjourned term of said court, the following further proceedings were had in this cause, on the 22d day of January, 1877, to wit:

Judgment set aside.

THE NORTHWESTERN UNION PACKET COMpany, plaintiff,
vs.
THE CITY OF ST. LOUIS, DEFENDANT.

Now come the said parties by their attorneys, and on motion of plaintiff, by attorney, it is ordered that the judgment heretofore entered herein on the 8th day of January, 1877, be and the same is hereby set
21 aside, and that the following special finding and judgment be now entered as of that date:

Special finding.

THE NORTHWESTERN UNION PACKET COMPANY, plaintiff,
vs.
THE CITY OF ST. LOUIS, DEFENDANT.

Now at this day come the said parties by their attorneys, the plaintiff by D. D. Duncan and James H. Davidson, esquires, and the defendant by E. T. Farish, esquire, and this cause being submitted to the court for trial, without the intervention of a jury, a jury having been waived by stipulation, upon the pleadings, exhibits, and proofs, upon consideration whereof, and being fully advised in the premises, the court finds as follows:

First. That the plaintiff is a corporation under and by virtue of the laws of the State of Iowa, and is a citizen of said State.

Second. That the defendant is a municipal corporation existing under the laws of the State of Missouri, and is a citizen of said State.

Third. That during the years 1870, 1871, and until March 28th, 1872, the plaintiff was engaged in the business of commerce and navigation on the Mississippi River, between ports and places in different States in the United States, and owned and employed in such business the steamboats Addie Johnston, Annie Johnston, Alexander Mitchell, Belle of La Crosse, City of Quincy, City of St. Paul, Damsel, Dexter, G. H. Wilson, Hudson, Jennie Baldwin, Keokuk, Mankato, Milwaukee, Mollie Mohler, Mollie McPike, Northwestern, Tom Jasper, Phil. Sheridan, S. S. Merrill, Victory, and a large number of barges, all of which were of more than twenty tons burthen, and were duly enrolled and licensed for the coasting trade, in accordance with the acts of Congress of the United States.

Fourth. That during said time plaintiff's steamboats and barges landed at St. Louis, in the State of Missouri, and that defendant
22 demanded from plaintiff certain sums of money, which sums were paid by plaintiff under protest, the protest being partly printed and partly written, and in the form following:

Steamboat * * *. At * * *. * * * 187. * * * Wharfmaster of * * *

SIR: You and the officers of the city under whose direction you act are hereby notified that the wharfage this day paid to the city of * * * by the above-named steamboat is paid under protest, and all that may hereafter be paid is here protested against, and payment is now made, and will hereafter be made, without waiving the right of the owners of said steamboat to recover the same from the city by an action at law.

* * * * * *,

Clerk of Steamboat * * *,

the blanks being properly filled, and that the protests so filled up were delivered to the person demanding said sums of money at the times they were paid.

Fifth. That the sums of money so paid under protest amount in the aggregate to $6,751.35, of which $3,431.40 were paid in the year 1870, $3,096.85 in the year 1871, and $223.10 in the year 1872.

Sixth. That said sums of money were demanded and received by the defendant under and by virtue of the following ordinances of the defendant:

[7097.]

An ordinance establishing and regulating the harbor department.

Be it ordained by the city council of the city of St. Louis.

ARTICLE I.

SECTION 1. There shall be a department of the city government styled the Harbor Department, which shall embrace the harbor-master and his deputies, the lumber-measurers, the wood-masters, and the licensed weighers on the levee.

SEC. 2. The harbor of the city of St. Louis comprises the bed of the Mississippi River, its channels, sloughs, bayous, bars, and islands,
23 from the mouth of the Missouri River to the southern boundary of said city.

SEC. 3. The jurisdiction of the harbor-master extends over all the lands, river-bank and beach dedicated, condemned, occupied, or used for wharf purposes within this city, and over so much of the Mississippi River, and to the middle of the main channel thereof, as lies immediately in front of the city over which the city has control.

SEC. 4. It shall be the duty of the harbor-master to direct the landing and stationing of all water-craft arriving at any point within the limits of the city, and to direct the discharge and removal of their cargoes, so as to prevent interference between different vessels and their cargoes; to superintend the arrangement of freight, merchandise, and materials for repairs on the river-bank, so that the same shall occupy as little space as possible; to see that all combustible materials on the landing are sufficiently protected from fire; to keep the wharf and the river along the shore free from improper obstructions; to keep in repair the ring-bolts provided for fastening vessels; to regulate and control by proper rules to be established and published all vehicles traversing the wharf or landing, and to remove thence such as unnecessarily obstruct free passage upon said wharf or landing; and generally to exercise complete supervision and control over the wharf, river-bank, landing, and Front street.

SEC. 5. All water-craft, of whatever kind, coming into this harbor, shall be moored at such points or places at the wharf or landing as may designated therefor by the harbor-master.

SEC. 6. The owners or persons in charge of any boat moored as in the preceding section provided, not engaged in receiving or discharging freight, shall, on order of the harbor-master, in writing, forthwith move said boat to such other place in the harbor as he may designate, there to remain until such time as it may be desired for said boat to return to the wharf to load.

SEC. 7. Any boat while engaged in receiving or discharging
24 freight may at any time be required to forthwith leave the paved wharf by order of the harbor-master, if in his opinion said boat is in danger of being injured by fire or ice.

SEC. 8. Any owner, agent, master, or other person having in charge any boat of whatever kind who shall neglect or refuse to conform to any order or regulation of the harbor-master authorized by this ordinance, or who shall moor said boat at any other place than that designated by the harbor-master, or who shall neglect or refuse to forthwith move said boat from the place where moored to such other place in the harbor as may be designated therefor by the harbor-master, shall, for every such

neglect or refusal, be deemed guilty of a breach of this ordinance, and, upon conviction thereof, be fined in a sum of not less than five nor more than two hundred dollars.

* * * * * * *

SEC. 11. Steamboats shall have preference in landing at the wharf or landing over other vessels and over rafts; but no vessel or raft shall, while discharging or receiving cargo or being broken up, be compelled to leave its place to give room for a steamboat.

SEC. 12. The harbor-master is hereby instructed to set apart a sufficient and convenient number of landings to accommodate the different wants of business, and to especially set apart a sufficient and convenient number of landings away from the paved wharf for sand, cobblestone, and gravel; no landing for sand, cobblestone, or gravel to exceed two hundred and fifty feet in length.

* * * * * * *

SEC. 14. The harbor-master shall register in a suitable book the date of the arrival of every water-craft liable to pay wharfage, with its name and tonnage by custom-house measurement, the name of its master, and the place whence it came; and to report to the city auditor, under oath, on or before the fourth day of each month, the number of arrivals in the preceding month and the amount of wharfage charged
25 thereon, and to report to the city council on the first day of each stated session thereof the whole number of arrivals during the preceding six months, the description and tonnage of the vessels, and the amount of wharfage charged thereon, together with a list of all parties who have been otherwise charged with wharfage or dues for the use of the public landing, or for any purpose whatever.

* * * * * * *

SEC. 19. The harbor-master shall, under direction of the mayor, provide, at the expense of the city, whenever the same shall be deemed necessary, suitable posts and ring-bolts for boats and rafts to make fast to, and keep the same in repair. All bills for expenses made under this section shall be approved by the harbor-master and the chairman of the committee on harbor, and the same shall be paid and charged to wharf account.

SEC. 20. The harbor-master is hereby further directed to extend the steamboat landing, north and south, as soon as the wharf shall be made suitable for the landing of merchandise and the depth of the water will justify, so as to give all the room required by boats for the handling, receiving, and discharging of freight and for the free passage of drays and other vehicles; and to designate the boundary for each class of boats, according to the wants of the different trades at the time of such extension.

* * * * * * *

SEC. 28. The following time shall be allowed to boats to discharge and take in cargo at the paved wharf, according to their respective tonnage: To boats of sixty tons burthen or less, five days; to those of over sixty and not exceeding one hundred tons, six days; to those of one hundred fifty tons, seven day; to those of one hundred and fifty and not exceeding three hundred tons, eight days; and to those of three hundred tons and over, ten days.

SEC. 29. The harbor-master may in any case, for good cause shown, extend the time in the preceding section mentioned for a period not exceeding three days.

26 SEC. 30. There shall be collected from each and every boat of whatever kind or description, except such as are hereinafter ex-

cepted, for each and every time the same shall come within the harbor of said city, and land at any wharf or landing, or be made fast thereto, or to any boat thereto fastened, or shall receive or discharge any freight or passengers in this city, or shall tow coal or any other article in the harbor, seven and one-half cents for each ton of said boat's burden, by custom-house measurement, as wharfage dues. If the boat have no custom-house measurement, or if the harbor-master be not satisfied as to the correctness of said boat's custom-house measurement, he is hereby empowered and directed to ascertain the tonnage of said boat by measurement according to the rules and regulations of the United States in the measurement of boats, and wharfage shall be collected according to such measurement; Provided, That any boat making regular daily, semi-weekly, tri-weekly, or weekly trips, or is engaged in the business of towing, and ferry-boats, may pay wharfage dues at a different or special rate, as may be provided by this ordinance.

SEC. 31. Payment by any boat of the amount of wharfage required by this ordinance to be paid entitles the same to remain within the harbor for the length of time allowed it by section 28 of this article to discharge and take in cargo. But every boat shall pay two cents for each ton of its burden for each day it remains longer than the time allowed by said section 28 to discharge and take in cargo, unless it be laid up or undergoing repairs away from the paved wharf.

SEC. 32. The harbor-master, if requested so to do by the person in charge of said boat, may cause to be collected a full wharfage instead of two cents per ton per day, if the excess of time be not more than seven days.

SEC. 33. Wharfage shall be collected from the regular packet-
27 line steamers, making daily, semi-weekly, tri-weekly, and weekly trips, at a rate of twenty-five per cent. less than the rate established in section thirty of this article; and in lieu of the twenty-five per cent. deduction all regular packet-boats entitled to said deduction as in this section provided may, at their option, pay twelve hundred dollars per year for each boat semi-annually in advance; the first half, or six hundred dollars, to be paid on the first day of February; the second half, or six hundred dollars, to be paid on the first day of August of each year.

SEC. 34. Wharfage in all cases is due and collectible as soon as the liability to pay the same accrues. It is due and collectible on every boat immediately on its arrival at any landing in the harbor, unless it be working under a city license, or pays by the month, semi-annually, or annually in advance; daily wharfage is due and collectible at any time on the day said liability accrues; wharfage chargeable on fire-wood, lumber, timber, logs, or other article, in boat or raft, is due and collectible at any time before said boat is unloaded or said raft is broken up.

SEC. 35. Wood-boats engaged in bringing fire-wood into the city for sale are permitted to land and remain for the length of time allowed by section twenty-eight of this article to discharge and take in cargo, free from the payment of wharfage; but if any such boat remain longer than the time allowed to discharge and take in cargo, it shall pay wharfage for such excessive time as other boats, as provided by section thirty-one of this article. Coal-flats on which coal is towed from place to place within the harbor, skiffs, and yawls are exempt from the payment of wharfage. While any boat shall be at the place designated by the harbor-master, away from the paved wharf, no wharfage whatever shall accrue against said boat; and on return of said boat to the paved wharf

to load it shall be allowed the balance of the time which, by its last payment of wharfage, remained unexpired at the time it left the
28 paved wharf: Provided, that any boat working under a city license, or pays wharfage by the month, semi-annually, or annually is excluded from the benefits of this section.

SEC. 36. Every owner or person in charge of any boat, fire-wood, lumber, timber, logs, or other article on which wharfage is due, who shall, after demand having been made, fail or refuse to pay the same, be deemed guilty of a violation of this ordinance, and, upon conviction thereof, shall be fined in a sum of double the amount of the wharfage so due and owing. The payment of said fine and costs shall operate as a discharge in full of said demand.

* * * * * * *

SEC. 39. Every person who shall place, or cause to be placed, any obstruction on the wharf or landing set apart for ferry-boats, packet-boats, or scavenger-boats shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum of not less than twenty nor more than one hundred dollars.

* * * * * * *

SEC. 45. All steamboats and wharf-boats lying at the levee within the harbor of the city of St. Louis shall be safely moored and secured to the ringbolts on the wharf by a good and sufficient iron head-chain and breast-chain to each boat; and the master, owner, or person in charge of any steamboat or wharf-boat not so secured shall be deemed guilty of a misdemeanor, and be liable to a fine of not less than fifty nor more than one hundred dollars; and it is hereby made the duty of the harbor-master to enforce this provision and report all parties offending against the same.

* * * * * * *

SEC. 51. The harbor-master and comptroller are hereby authorized and directed to allow the unimproved and unoccupied portion of the river shore and bank not immediately needed for general public uses to be judiciously and temporarily used and occupied on such terms and conditions as they shall deem proper. Every person desiring to use or occupy any portion of the aforesaid river shore or bank must first
29 contract in writing for such privilege with the harbor-master and comptroller, and every such contract shall be rescinded at the pleasure of the harbor-master and comptroller or by order of the city council. And the comptroller shall report to the city council all contracts so made for its approval.

SEC. 52. Every person who shall fail to obey the directions of the harbor-master, the lumber measurers, or any of their deputies, or the wood-masters in relation to any matters over which they respectively have charge, or shall in any manner violate or fail to comply with any of the provisions of this ordinance in cases where no special penalty or fine is prescribed, shall be deemed guilty of a violation of this ordinance, and shall, upon conviction thereof, be fined in a sum of not less than five nor more than one hundred dollars.

ARTICLE II.— *Wharf-boats.*

SEC. 1. Any person or persons, corporation or company, owning or representing steamboats regularly engaged in carrying freight or passengers to and from this city, pursuant to the laws and regulations of the United States and this State concerning steamboats, may have the

right to moor a wharf-boat at the paved landing, to be used exclusively by such person or persons, corporation or company, for the purpose of facilitating and cheapening the handling and transportation of freight by complying with the terms and conditions of this ordinance in relation to wharf-boats.

* * * * * * *

SEC. 3. Representatives of five or more steamboats, who shall cause at least two of said boats to leave this city each week in their regular trade, may moor a wharf-boat not over three hundred feet long. Representatives of four or more steamboats who shall cause at least three of said boats to leave this city each week in their regular trade, may moor a wharf-boat not over two hundred and fifty feet long. Representatives of two steamboats who shall cause each of said boats to leave this
30 city at intervals of not over three days apart in their regular trade, may moor a wharf-boat not over one hundred feet long. Representatives of one steamboat who shall cause it to leave this city daily in its regular trade may moor a wharf-boat one hundred feet long. Nothing herein shall prevent two or more companies or associations from joining together in maintaining and using one wharf-boat for the transaction of their business as provided in this ordinance: Provided, however, that any wharf-boat moored at the wharf at the adoption of this ordinance, being more than three hundred feet long, may continue to be so used as a wharf-boat by complying in all other respects with the provisions of this ordinance.

SEC. 4. No person keeping or interested in any wharf-boat shall be allowed to charge for the storage or forwarding of any freight or merchandise passed over said wharf-boat nor to receive any commission on said freight or merchandise; nor shall any packet boat having wharf-boat privileges be allowed to receive freight at any other place on the paved wharf than in front of its respective wharf-boat unless with the consent of the harbor-master.

SEC. 5. All wharf-boats moored at the wharf shall be so fastened that their chains, cables, stages, and crabs shall offer the least possible obstruction to the free passage of drays and wagons. The harbor master and mayor shall designate the place at the wharf where each wharf-boat shall lie, and every wharf boat shall remove to any other place at the wharf whenever the mayor or harbor-master shall so direct.

SEC. 6. Any person or persons, corporation or company, transporting general merchandise upon barges by means of steam tow-boats to and from this port may avail themselves of the provisions of this ordinance in regard to wharf-boats on the same terms and conditions as are applied to steamboats regularly carrying freight and passengers.

SEC. 7. The mooring of any wharf-boat shall not affect in any
31 manner the wharfage tax or dues on any boat engaged in any trade or line of packets, but wharfage shall be collected from each boat landing at any wharf-boat as though said wharf-boat was not there; but wharf-boats while used exclusively as such, in compliance with this ordinance, are not liable to the payment of wharfage.

SEC. 8. Every wharf-boat shall at all times be connected with the wharf by at least two stages each, of sufficient size and strength that loaded drays and wagons may safely drive over the same to and from said boat; and every wharf-boat shall have sufficient breadth of beam and strength of deck to receive on board at any one time at least three loaded two-horse drays or wagons, with room for said vehicles to load and unload, and pass and repass. Provided, that the wharf-boat be-

longing to the Naples and Peoria Packet Company, now moored at the wharf, is excepted from the provisions of this section.

SEC. 9. Every person who shall moor or continue a wharf-boat within this city contrary to the provisions and requirements herein provided, shall be deemed guilty of a breach of this ordinance, and upon conviction thereof shall be fined in a sum of not less than fifty nor than one hundred dollars for each breach, and every day said wharf-boat is so continued without complying with the provisions of this ordinance shall constitute a new breach thereof.

ARTICLE V.—*Lumber-measurers.*

* * * * * * *

SEC. 4. The lumber-measurer, immediately on anything being landed upon the wharf or landing, or lying thereat in boat or raft, shall, by bill of lading thereof, by oath of a credible person, by measurement, inspection, counting or otherwise, as he may see proper, ascertain the quantity of such article in order to determine the amount of wharfage to be charged thereon, and shall report the same in writing with
32 the name of the consignee or owner, forthwith, to the harbor-master, who shall make out a bill for wharfage due on the same, and place said bill in the hands of the city collector for collection. Provided, that all lumber brought to this city by steamboats, and other water-craft that pay wharfage for discharging freight on the wharf or landing, is hereby permitted to be landed free of wharfage.

SEC. 5. All articles brought to this city by water and landed on the wharf or landing, and which are placed under the supervision of any licensed lumber-measurer, shall be placed where and in such manner as the harbor-master may direct.

SEC. 6. All boards, planks, scantling, joists, and square timber of every kind, measured by a lumber-measurer on the wharf or landing, shall be placed, assorted and handled for measurement by the owner thereof, or at his expense, by persons employed by the lumber-measurer for that purpose.

SEC. 7. The lumber-measurer shall, upon measuring any lumber, give a certificate stating the quality and quantity thereof.

* * * * * * *

SEC. 16. The following amounts shall be collected for wharfage on the articles in this section designated, when landed at or on the wharf or landing, or lying thereat in boat or raft: On boards, planks, scantling, and joists, ten cents per thousand feet, board-measure; on timber more than twelve inches square, ten cents per hundred feet, cubic measure; on shingles and laths, three cents per thousand; on clapboards, palings, staves, wagon-makers' and coopers' stuff of all kinds, ten cents per thousand; on cedar and other posts, not more than eight feet long, twenty cents per hundred; more than eight and not more than twelve feet long, thirty cents per hundred; more than twelve and not more than sixteen feet long, fifty cents per hundred; over sixteen feet long, in the same proportion as the last; on logs in raft or otherwise, one cent each.

* * * * * * *

ARTICLE VI.—*Wood-masters.*

33 SECTION 1. For the purpose of receiving, ranking and measuring cord-wood, and collecting wharfage thereon, the city is

hereby divided into two districts: All that part of the city lying south of the centre of Market street shall compose the southern district; and all that part of the city lying north of the centre of Market street shall compose the northern district.

SEC. 2. There shall be a wood-master appointed by the mayor, in and for each of said districts, by and with the consent of the city council, who shall hold his office for one year.

SEC. 3. Every wood-master, before entering on the duties of his office, shall execute a bond to the city, in the penal sum of two thousand dollars, with two or more sureties, to be approved by the mayor, conditioned for the faithful performance of the duties of said office.

SEC. 4. It shall be the duty of the wood-master to superintend and direct the landing of all firewood brought to the city by water and landed on the wharf or landing, and to cause the same to be piled up in a close and compact manner, and to measure the same, and to exercise, under the control of the harbor-master, general supervision over the wharf or landing in relation to firewood landed thereon. And he shall, whenever thereunto requested by the harbor-master, inform him of the quantity of firewood on the landing, and the length of time it has remained thereon, and the amount of wharfage, if any, due on same.

* * * * * * *

SEC. 6. There shall be collected wharfage of ten cents on each and every cord of firewood brought to this city by boat or raft, either before or after the same is unloaded from boat or raft, with the permission that the same may remain on the landing a length of time not to exceed one month; and whenever the same shall remain longer than one month it shall be required to pay ten cents a cord in advance every twenty days for the time it may so remain; and it shall be the duty of the
34 wood-master to report in writing to the harbor-master the amount of all firewood, with the name of the owner or consignee thereof, subject to payment of wharfage, as soon as it arrives within his district, and also to report as aforesaid the amount of all firewood liable to the payment of wharfage within his district by reason of its having remained on the landing longer than the time allowed by this section since the last payment of wharfage; and said wood-master shall be entitled to collect as part of his compensation twenty per cent. of the amount of wharfage collected on all firewood so reported by him, payable at the first day of the month following such collection of wharfage by the city on the certificate of the harbor-master, payable out of the wharf-fund. Provided, that wood on steamboats, intended for their own use, is not subject to the payment of wharfage. Provided, further, that no portion of the paved wharf or landing shall be occupied by wood from March the first to December the first, nor at any other time, unless by permission of the harbor-master.

* * * * * * *

[7506.]

An ordinance to reduce the rate of wharfage in the city of St. Louis.

Be it ordained by the city council of the city of St. Louis:

SECTION 1. Section thirteenth of article first of ordinance seven thousand and ninety-seven, entitled "An ordinance establishing and regulating the harbor department of the city of St. Louis," is hereby amended by striking out the words "seven and one-half cents" where

they occur in said section, and insert in lieu thereof the words "five cents."

SEC. 2. Section thirty-third of article first of said ordinance is hereby amended by adding after the word "article" in said section thirty-third, the words "as amended," and striking out the words "twelve hundred dollars per year," and inserting in lieu thereof the words "eight hundred dollars per year."

SEC. 3. Section first of article third of said ordinance is
35 hereby amended by striking out the words "twelve dollars and fifty cents" and inserting in lieu thereof the words "ten dollars," and by striking out the words "twenty-five dollars per month," and inserting in lieu thereof the words "twenty dollars per month."

SEC. 4. This ordinance shall take effect and be in force on and after the first day of February, eighteen hundred and seventy-one.

Approved January 31, 1871.

Seventh. That said ordinances were passed and adopted by authority of the following provisions in the charter of defendant:

Sec. 1, art. III, p. 69, revised city charter: "The mayor and city council shall have power within the city, by ordinance, not inconsistent with any law of the State."

Subdivision eighth, p. 70: "To regulate the stationing, anchoring, and mooring of vessels within the city. To charge and collect wharfage and tonnage dues; wharfage on fire wood, lumber, timber, logs, etc., brought to the port of St. Louis."

Sec. 4, art. VI, p. 88: "The city council shall also, from time to time, provide by ordinance for the levy and collection of all other taxes, licenses, wharfage and other dues, and to fix the penalties for neglect or refusal to pay the same, which now or hereafter may be authorized by law or ordinance."

Sec. 1, chap. IV, p. 120: "For maintaining the permanency and improving the wharf and harbor, and for opening and extending the wharf. It shall be competent for the city of St. Louis to apply all the net receipts from wharfage to the credit of wharf funds."

Eighth. That the sums so demanded and paid were reasonable in amount, and a reasonable compensation for the use of defendant's wharf, if defendant was entitled to collect any sums whatever under said ordinances and laws.

Ninth. That on the 1st day of August, 1875, plaintiff made demand in writing for the repayment of the money so paid by it under protest, and that defendant refused to repay the same.

36 Tenth. That defendant acquired at its own expense, and owns the property within its limits along the west bank of the Mississippi River, and for the purposes of a wharf has improved and paved one and one-half miles of the same at an enormous expense, and that said wharf is and was kept in repair by defendant at its own expense.

Eleventh. That said improvement and paving were intended by defendant and were used by plaintiff as a wharf to assist boats and vessels in landing in the pursuit of their business at all stages of the water in the river, and in receiving and discharging freight, and for the convenience of passengers in getting on and off boats; and also to facilitate the business of the citizens of defendant in shipping and receiving freight by river transportation.

Twelfth. That plaintiff's boats landed only at said improved wharf, and where accommodations existed therefor.

Thirteenth. That the city of St. Louis was the point of departure and

destination of plaintiff's boats, and that said boats loaded and unloaded passengers and freight upon and across said wharf, and remained moored to it so long a time as was necessary for that purpose, whether for one or more days, and that wharfage was demanded and collected by defendant for the time they so remained and occupied said wharf in accordance with the provisions of defendant's ordinances.

Fourteenth. That plaintiff during the years 1870, 1871, and 1872 had certain contracts with the United States of America for carrying the mails between St. Paul, in the State of Minnesota, and Dunleith, in the State of Wisconsin; between Dunleith and La Crosse, in the State of Wisconsin, and between La Crosse, in the State of Wisconsin, and Winona, in the State of Minnesota; by which contracts it was bound to deliver the mails at various places at certain schedule times under a penalty of fifty dollars for each failure so to do; and that the
37 boats used for carrying said mails made through trips to the city of St. Louis, but that plaintiff had no contract for delivering mails at the city of St. Louis, or at any point on the Mississippi River below Dunleith, Wisconsin.

Fifteenth. That the daily expense of navigating each of plaintiff's steamboats was from one hundred and fifty to three hundred and fifty dollars, according to the size of the boat.

As a conclusion of law on the pleadings and foregoing facts, the court finds that the plaintiff is not entitled to recover, to which conclusion and finding the plaintiff then and there duly excepted.

(Signed) JOHN F. DILLON.
SAMUEL TREAT.

Judgment.

It is therefore now considered by the court that the plaintiff, The North Western Union Packet Company, take nothing by its writ herein; that the defendant, The City of St. Louis, go hence without day and have and recover against said plaintiff its costs herein expended, and that execution issue therefor. It is further ordered, that the motion for a new trial herein be now overruled.

And afterwards, at said adjourned term of said court, the following further proceedings were had in this cause on the 26th day of January, 1877, to wit:

NORTH WESTERN UNION PACKET CO., PLAINTIFF,
v.
CITY OF ST. LOUIS, DEFENDANT.

Now comes the plaintiff, by its attorney, and presents to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation citing and admonishing the said defendant to be and appear at the Supreme Court of the United States, on the second Monday of October next, and thereupon said writ of error is allowed and said citation signed by the judge; and the said plaintiff also presents to the court the bond required on the allowance of writ of error, which bond is approved and ordered to be filed.

38 And the said bond so approved as aforesaid is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, The North Western Union Packet Company, as principal, and William F. Davidson & Anthony C. Dunlevy, as sureties, are held and firmly bound unto The City of St. Louis the in the full and just sum of one thousand dollars ($1,000), to be paid to said The City of St. Louis, its successors or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals, and dated this twenty third day of January, in the year of our Lord one thousand eight hundred and seventy-seven.

Whereas lately, at the September term, 1876, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between The North Western Union Packet Company, plaintiff, and The City of St. Louis, defendant, judgment was rendered against the said plaintiff, The North Western Union Packet Company, and the said The North Western Union Packet Company having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The City of St. Louis, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such that if the said The North Western Union Packet Company shall prosecute said writ to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

THE NORTH WESTERN UNION PACKET COMPANY,
By D. D. DUNCAN, *Att'y.* [SEAL.]
WM. F. DAVIDSON. [SEAL.]
A. C. DUNLEVY. [SEAL.]

39 Approved by—

SAMUEL TREAT,
Judge.

Upon the special finding and conclusion the judges of said court delivered and filed the following opinions:

THE NORTHWESTERN UNION PACKET CO.
v.
THE CITY OF ST. LOUIS.

This action against the City of St. Louis is to recover back wharfage dues collected by the city in 1870, 1871, and up to March, 1872, from the plaintiff's boats. The payments were made under "written protest, without waiving the right of the owners of the boats to recover the same from the city by an action at law."

D. D. Duncan and James H. Davidson for the plaintiff.

E. T. Farish for the city.

TREAT, J.:

This case involves the right of the plaintiff to recover back money paid under protest. Within adjudicated cases the right of action exists if the taxes or assessments are illegal, and the payment thereof was involuntary. The main proposition, therefore, requires a determination of the question as to wharfage tax proper—what it is, and where it ends.

Under the decisions of the United States Supreme Court as to tonnage duties, regard being had to dicta concerning wharfage tax, the rules of law may be thus stated:

1st. The general power of a State to tax property must, in its exercise, impose the tax, not on the tonnage of the vessel, but on the money value of the vessel.

2d. It is beyond the power of a State or municipality to tax a vessel, foreign or domestic, for the privilege of landing or anchoring in any port, whether the tax is upon the tonnage of the vessel or otherwise.

40 3d. It is in the power of a municipality under legislative authority to exact reasonable wharfage for the privilege of landing at an improved wharf, care being had to prevent the municipality from imposing tonnage or other prohibited rates or taxes under the pretence of collecting wharfage dues.

It is very difficult, in the light of adjudicated cases, to draw the precise line, in general terms, between the various classes. The foregoing rules must suffice for a guide.

It appears from the facts agreed that the city claims to be proprietor of most of the river front, a part of which has been improved, graded, and paved by the city at large cost. Under the supposed authority vested in it by charter, and under ordinances pursuant thereto, it has made many regulations of a police nature, not only as to the parts of the harbor where vessels, rafts, etc., may land, but also as to the safety of the inhabitants dependent upon the character of the cargo—whether explosive, dangerous, etc. It is admitted that under said regulations the plaintiff used the improved part of said landing, or the so-called wharf, thus artificially made and designated for specific purposes. The rates of wharfage charged were not in all cases a specific sum for a specified time, but a rate dependent on the tonnage of the vessel.

If the city have the right to charge wharfage, then the sole question is whether it is prohibited from making its rates dependent on the tonnage of the vessel eo nomine instead of its length, denoting the space it would occupy, or whether the city should fix its rate of wharfage arbitrarily upon every craft landing, irrespective of tonnage, size, &c. It would be a narrow view of the question to admit that wharfage is collectable, and to hold, at the same time, that the amount of wharf-

41 age dues is not collectable because that amount, though reasonable, is, instead of a sum certain upon every craft, adjusted to the size of the craft, to be ascertained by its tonnage. It may be conceded that no municipality can forbid the entry, anchoring, or landing of a vessel engaged in foreign or inter-State commerce unless it pays a tonnage duty for said privilege. It must also be held that when there is ample space for landing within a harbor outside of the improved part thereof or wharves, if a vessel is desirous of receiving the benefit of said improvements for the purpose of the extra facilities thereby furnished for mooring safely and conveniently and loading and unloading cargoes, and also for the accommodation of passengers, said vessel thus availing itself of the extra facilities, to secure which the municipality has made large expenditures, should pay therefor a reasonable compensation. The case might be very different if a city, claiming the entire river front, forbade anchoring or landing within its limits without payment of tonnage duty. It could not stop the right to navigate and trade from port to port, but it could lawfully designate within its police powers at what part of the port the landing should be made. This might be as important for sanitary as other useful purposes. To hold otherwise would be to decide that the population of every town and city is deprived of the

right of self-protection, and is absolutely at the mercy of every vessel which arbitrarily chooses to bring infectious diseases and consequent death with it.

There is a rational limit in all questions of this kind. No city, under pretence of wharfage dues, is permitted, in order to replenish its treasury, to levy a tax in the nature of a tonnage duty upon vessels of commerce, nor can it do so by way of discrimination. Each city under legislative authority or riparian owner can lawfully charge a reasonable compensation for the use of expensive and artificial conveniences which a vessel may use or not at its option, there being ample space elsewhere for it to land within the harbor where no artificial or expensive improvements have been made. In such instances there is no impediment to commerce, no tonnage or other exactions restrictive upon navigation, but merely facilities furnished which, if used, ought to be paid for. The vessel is not bound to use such facilities, but if it does, why should it not contribute to the costs and maintenance thereof?

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Although the St. Louis ordinance prescribes wharfage dues at the improved wharves by it constructed, graduated according to the size of the vessel, to be ascertained by its tonnage, such wharfage dues are not tonnage duties within the inhibitions of the Constitution.

DILLON, circuit judge:

1. I concur in the conclusion, and mainly in the reasoning of the foregoing opinion. I have some doubt whether the payment of the taxes under a mere written protest delivered from time to time without any process being issued by the city, and where the mode of enforcing the wharfage dues, as prescribed by ordinance, is by an action against the owner or person in charge of the boat, in which it is provided that if convicted the judgment shall be a fine in a sum double the amount of wharfage due the city, payment of which fine and the costs shall operate as a discharge in full of the demand, (city harbor ordinance, sec. 36), is such an involuntary or compulsory payment of the taxes as will give the party so paying the right to recover back the amount even if the ordinance under which the tax was demanded is illegal. But, as the counsel for the city does not press this point in the argument submitted, I pass it without decision, the more readily, because the parties evidently desire a determination of the validity of the ordinance, and because the conclusion reached on this subject renders it unnecessary to decide whether the payments were compulsory in such a sense as to ground the right to recover them back, if the tax was not legally demandable or enforceable by the city.

43

2. Part of the river bank in front of the city of St. Louis has been graded, riprapped, and macadamized or paved at "an enormous expense to the city," for the purpose of affording facilities for the landing, loading, and unloading of steamboats at the city. Boats landing within the harbor of the city, but away from the paved or improved wharf, are not required to pay wharfage. (Ordinance, sec. 35.) But boats landing at the paved and improved wharf are required to pay wharfage dues or tax. Section 28 of the ordinance prescribes the time that "shall be allowed to boats to discharge and take in cargo at the paved wharf, according to their respective tonnage," i. e., the more tonnage a vessel has the longer the time allowed to occupy the wharf. Section 30 of the ordinance, which is attacked by the plaintiff as in conflict with the Constitution of the United States, is in these words: "There shall be col-

lected from each and every boat, of whatever kind, except such as are hereinafter excepted, for each and every time the same shall come within the harbor of this city, and land at any wharf or landing, or be made fast thereto, or to any boat thereto fastened, or shall receive or discharge any freight or passengers in this city, five cents for each ton of said boat's burden, by custom-house measurement, as wharfage dues; provided, that any boat making regular daily, semi-weekly, tri-weekly, or weekly trips, may pay wharfage dues at a different or special rate, as may be provided by this chapter.

The charter of the city authorizes it "to charge and collect wharfage and tonnage dues," and section 30 of this ordinance is not claimed
44 to be invalid, unless it is in conflict with the provisions of the Federal Constitution in respect to inter-State commerce, and the prohibition that "no State shall, without the consent of Congress, lay any duty of tonnage."

It may be admitted that the right to the free navigation of the Mississippi River is, under the provisions of the Constituion relating to commerce, and the prohibition upon the States to levy duties upon vessels as the vehicles of commercial intercourse (Steamship Co. v. Port Wardens, 6 Wall., 34, 35), inconsistent with the right of a State to absolutely prohibit steamboats from landing at a city or port, without paying for the privilege. The ordinance of the city (sec. 2,) defines the harbor of St. Louis to extend "from the mouth of the Missouri River to the southern boundary of the city." The city has not undertaken to demand of the plaintiff wharfage for all boats landing at any point within its corporate limits. But a city is under no legal obligation to provide, at its own expense, an improved wharf, and to allow all vessels to use the same without compensation. It may be that a city cannot, even under authority from the State, compel vessels to land at its improved wharf, and levy a toll or tax therefor. No such thing has been here attempted. The case before us shows that the city has improved a wharf for the convenience of commerce. It demanded compensation from such boats as saw fit to avail themselves of the improved wharf. The plaintiff's boats voluntarily used this wharf.

It is expressly admitted in the stipulated facts, "that the several sums demanded and collected by the city, are a reasonable compensation, provided the city was entitled to collect any dues from steamboats under the ordinance and laws" in that behalf. Congress has not seen proper to legislate on this subject, and the many provisions of the ordinance of the city of St. Louis, "establishing and regulating the
45 harbor department" of the city, shows the necessity for regulations in respect to the landing of boats and vessels of all kinds, and the desirableness of appropriate facilities therefor. Unless, therefore, the ordinance of the city provides for a tax or duty on tonnage, it would seem to be free from any constitutional objection. This requires of boats landing or making fast to the wharf or landing, or receiving or discharging freights or passengers in the city, to pay five cents for each ton of the boat's burden, as wharfage dues. Other sections of the ordinance show that the city does not demand wharfage dues for landing away from the improved wharf; and it is expressly agreed in this case that "the boats of the plaintiff only landed at the improved wharf where accommodations existed therefor." Under the facts of this case, the words of section 30, requiring wharfage dues from any boat which "shall receive or discharge any freight or passengers in the city," have no application, and it is not necessary to construe

them in connection with other parts of the ordinance, nor to affirm their validity.

As the plaintiff voluntarily used the improved wharf for its boats, as and as it is admitted that the compensation therefor prescribed in the ordinance is reasonable, I am of opinion that the ordinance is not invalid merely because it fixes and graduates the amount by reference to the tonnage or capacity of the boat. A previous section makes the time which the paved wharf may be used by the boats depend upon their tonnage, which is obviously a reasonable provision, and by section 30, the amount of compensation is graduated in the same way. If it appeared that the city was attempting, under the cover of a wharf tax, to levy duties on the tonnage of the vessels, or to exact payment for the mere privilege of landing within the city, its pretentions could not be supported.

Upon the case before us my judgment is that the city is not
46 liable to pay back the money for which this action is brought.

Judgment for defendant.

47 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify that the writing hereto annexed is a full and complete transcript of the record and proceedings had in said court in case of the Northwestern Union Packet Company, plaintiff, vs. The City of Saint Louis, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this 2d day of February, in the year of our Lord eighteen hundred and seventy-seven.

[SEAL.]

M. M. PRICE,
Clerk of said Court,
By A. P. SELBY,
Deputy.

(Indorsement on cover:) No. 339. The Northwestern Union Packet Company, plaintiff in error, vs. The City of St. Louis. E. Missouri C. C. U. S. Filed 26th February, 1877.

Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 110.

THE NORTHWESTERN UNION PACKET COMPANY,

Plaintiff in Error,

against

THE CITY OF SAINT LOUIS,

Defendant in Error.

Brief and Argument for Appellant.

JAMES H. DAVIDSON,
St. Paul, Minn.

D. D. DUNCAN,
St. Louis, Mo.

Counsel for Appellant.

H M. Smyth & Co., Printers, St. Paul.

Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 110.

THE NORTHWESTERN UNION PACKET COMPANY,
Plaintiff in Error,

vs.

THE CITY OF SAINT LOUIS,
Defendant in Error.

STATEMENT OF THE CASE.

1st. The plaintiff in error is a corporation duly incorporated under the laws of the State of Iowa, and a citizen thereof.

2d. The defendant is a municipal corporation under the laws of the State of Missouri, and a citizen thereof.

3d. That during the years 1870–1871, and up to March 28th, 1872, plaintiff was engaged in the business of commerce and navigation on the Mississippi River, between ports and places in different States of the United States, and owned and employed in its said business, certain steamboats and barges, all of which were of more than twenty tons burden, and were duly enrolled and licensed for the coasting trade, in accordance with the acts of Congress of the United States.

4th. That during said time, the plaintiff had certain contracts with the United States for carrying mails between St. Paul, Minnesota, and Dunleith, Wisconsin, and between Dunleith and La Crosse, Wisconsin, and between La Crosse, Wisconsin, and Winona, Minnesota, by which it was bound to deliver the U. S. mails at various points on certain schedule time, under a penalty of $50 for each failure so to do, and the boats carrying said mails ran through to St. Louis, Missouri, but did not deliver any mails at St. Louis, or below Dunleith, Illinois.

The expense of each boat was daily from $150 to $350, varying according to the size of the boat.

5th. During the time mentioned in the complaint, the proper authorities of St. Louis demanded of plaintiff certain charges claimed as wharfage dues under and by virtue of the ordinances of said city, which are fully set out in the record from pages 13 to 20, inclusive.

6th. During such time, plaintiff paid in the aggregate to said city, the sum of six thousand seven hundred and seventy-eight dollars and ninety-five cents, making each payment under protest, personally served upon the officer collecting the same, and in the form set out on page 12 of the Record herein.

7th. Plaintiff brought this action to recover the sums of money so paid with interest, and the cause having been determined adversely to plaintiff, it prosecutes this writ of error to reverse the judgment of the Circuit Court.

Plaintiff relies upon the following:

ASSIGNMENTS OF ERROR.

First, Because the ordinance of the defendant (particularly sec. 30) is in conflict with article 1, sec. 10, paragraphs 1 and 2 of the constitution of the United States, which reads as follows:

"No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws * * * No State shall, without the consent of Congress, lay any duty of tonnage."

Second, Because said ordinance is in conflict with article 1, section 9, paragraph 5 of the constitution of the United States, which reads as follows:

"No tax or duty shall be laid on articles exported from any State; no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to

or from one State be obliged to enter, clear or pay duties in another."

Third, Because said ordinance is in conflict with article 1, section 8, paragraph 3, of the constitution of the United States, which reads as follows:

"* * * * * * Congress shall have power to regulate commerce with foreign nations and among the several States, and with the Indian tribes."

Fourth, Because said ordinance is in conflict with the treaty of Great Britain, known as the "Treaty of Paris, 1783," the VIII section of which reads as follows: "The navigation of the river Mississippi from its source to the ocean, shall forever remain free and open to the subjects of Great Britain and the citizens of the United States."

Fifth, Because said ordinance is in conflict with the treaty of Spain, concluded October 27th, 1795, article IV of which reads as follows:

"* * * * And his Catholic Majesty has likewise agreed that the navigation of the said river in its whole breadth from its source to the ocean, shall be free only to his subjects and the citizens of the United States."

Sixth, Because said ordinance is in conflict with the ordinance of 1797, which among other things, provides "That the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said terri-

tory as to the citizens of the United States, that may be admitted into the confederacy without any tax, impost or duty therefor. * * * *."

BRIEF.

The assignments of error numbered one, two and three are particularly relied upon, and will be discussed in the argument, but the following authorities are cited as bearing more or less upon all the assignments:

Cannon v. New Orleans, 20 Wallace, 577; Steamship Co. v. Port Wardens, 6 Wall, 31; State Tonnage Tax cases, 12 id. 204; Peete v. Morgan, 19 id. 581; Northwestern Union Packet Co. v. St. Paul, 3 Dillon, 454, Inman Steamship Co. v. Tinker, 94 U.S. 238; Gibbon v. Ogden, 9 Wheat.; 1 Brown v. Maryland, 12 id. 419; Smith v. Turner, 7 Howard, 283; Sinnot et al v. Davenport et al id. 227; Almy v. State of California, 24 id. 169; Hackley v. Geraghty, 34 N. Y. L. 335; People v. Raymond, 34 Cal. 492; People v. Moring, 47 Barb. (N. Y.) 642; Alexander v. Railroad Co. 3 Strobh (S. C.) 594; Sheffield v. Parsons, 3 Stew & P. (Ala.) 302; Lott v. Morgan, 41 Ala. 250; Passenger cases, 7 Howard, 283; Henderson et al v. Mayor of the City of New York et al, 92 U. S. 259; Chy Lung v. Freeman et al, id. 275; Cooley v. Board of Wardens, 12 Howard 299; City of New York v. Miln, 11 Peters, 102; Tobin et al v. Vicksburg Central Law Journal, March 23d, 1877, 276; (No. 148 on Calender Sup. Ct. U. S. Oct. Term, 1879) Brown v. Maryland, 12 Wallace, 419; State Freight Tax Cases, 15; id. 232;

Corfield v. Caryell, 4 Washington C. C. Rep'ts, 371; Crandall v. State of Nevada, 6 Wallace, 37.

ARGUMENT.

The ordinance in question is entitled, "An ordinance establishing and regulating the harbor department," and article 1, section 30, provides: "Sec. 30. There shall be collected from each and every boat, of whatever kind or description, except such as are hereinafter excepted, for each and every time the same shall come within the harbor of said city, and land at any wharf or landing, or be made fast thereto, or to any boat thereto fastened, or shall receive or discharge any freight or passengers in this city, or shall tow coal or any other article in the harbor, seven and one-half cents for each ton of said boat's burden, by custom-house measurement, as wharfage dues. If the boat have no custom-house measurement, or if the harbor-master be not satisfied as to the correctness of said boat's custom-house measurement, he is hereby empowered and directed to ascertain the tonnage of said boat by measurement, according to the rules and regulations of the United States in the measurement of boats, and wharfage shall be collected according to such measurement; *Provided*, that any boat making regular daily, semi-weekly, tri-weekly or weekly trips, or is engaged in the business of towing, and ferry-boats, may pay wharfage dues at a different or special rate, as may be provided by this ordinance."

"Sec 31. Payment by any boat of the amount of wharfage required by this ordinance to be paid, entitles the same to remain within the harbor for the length

of time allowed it by section 28, to discharge and take in cargo, unless it be laid up or undergoing repairs away from the paved wharf."

"Sec. 32. The harbor-master, if required so to do by the person in charge of said boat, may cause to be collected a full wharfage instead of two cents per ton per day, if the excess of time be not more than seven days."

"Sec. 33. Wharfage shall be collected from the regular packet-line steamers, making daily, semi-weekly, tri-weekly and weekly trips, at a rate of twenty-five per cent. less than the rate established in section 30 of this article; and in lieu of the twenty-five per cent. deduction, all regular packet boats entitled to said deduction, as in this section provided, may, at their option, pay twelve hundred dollars per year for each boat, semi-annually in advance; the first half, or six hundred dollars, to be paid on the first day of February; the second half, or six hundred dollars, to be paid on the first day of August of each year."

"Sec. 34. Wharfage in all cases is due and collectible as soon as the liability to pay the same accrues. It is due and collectible upon every boat immediately on its arrival at any landing in the harbor, unless it be working under a city license, or pays by the month, semi-annually or annually in advance; daily wharfage is due and collectible at any time on the day said liability accrues; wharfage chargeable on fire-wood, lumber, timber, logs, or other article, in boat or raft, is due and collectible at any time before said boat is unloaded or said raft is broken up."

"Sec. 35. * * * * * * * * *."

"Sec. 36. Every owner or person in charge of any boat, fire-wood, lumber, timber, logs, or other article on which wharfage is due, who shall, after demand having been made, fail or refuse to pay the same, shall be deemed guilty of a violation of this ordinance, and, upon conviction thereof, shall be fined in a sum of double the amount of the wharfage so due and owing. The payment of said fine and costs shall operate as a discharge in full of said demand." (Record, pages 14, 15, 16.)

January 31st, 1871, the ordinance was amended by reducing the rate to "five cents," and by allowing steamboats to pay "eight hundred dollars per year," instead of "twelve hundred." (Record, page 20.)

The charter of the city of St. Louis authorized the mayor and common council, among other things, "to charge and collect wharfage and tonnage dues," and appellant claims that the moneys paid by it to the city fall within the latter classification, viz. "tonnage dues."

What are tonnage dues? This question has been so clearly and fully stated by this Court, that we here give its definition thereof. "Tonnage in our law, is a vessel's 'internal cubical capacity in tons of one hundred cubic feet each, to be acertained'" in the manner prescribed by Congress; Act of May 6, 1864, 13 Stat., pp. 70, 72; Rev. Stat. U. S. 804, § 4,153. "Tonnage duties are duties upon vessels in proportion to their capacity." Bouv. Law Dict., "Tonnage."

* * * * * * *

"The vital principle of such a tax or duty is, that it is imposed, whatever the subject, solely according to

the rule of weight, either as to the capacity to carry, or the actual weight of the thing itself." *Inman Steamship Co. v. Tinker, 94 U. S. p. 243.*

In that case, the provisions of the ordinance were very similar to the St. Louis ordinance, and required from ships "which shall enter the port of New York, or load or unload, or make fast to any wharf therein, shall pay one and one-half of one cent per ton, to be computed from the tonnage expressed in the registers of enrollments of such ships or vessels respectively."

The St. Louis ordinance only differs from this one, by saying, "and" instead of "or." It reads, "for each and every time the same shall come within the harbor of said city, *and* land at any wharf or landing, or be made fast thereto, or to any boat thereto fastened, or shall receive or discharge any freight or passengers in this city, or shall tow coal or any other article in the harbor."

If a boat enter the harbor and land, load or unload, make fast to the wharf or landing, receive or discharge passengers or freight, or without doing any of these, she enter the harbor towing coal or any other article, she becomes liable for this tax.

It is not based upon "services rendered or offered to be rendered," but upon the cubical capacity or tonnage of the vessel. In the Inman Steamship Co. case above referred to, this court, in discussing the facts of that case, say: "If the vessel enter the port and immediately take her departure, or load or unload, or make fast to any wharf, either of these things disjunctively brings her within the act, and makes her liable to the burden prescribed."

Any one of the same things in the case under consideration "*disjunctively*" brought the steamboats of appellant within the act, and made them liable to the burden prescribed. It is well to bear in mind that "the harbor of the city of St. Louis comprises the bed of the Mississippi river, its channels, sloughs, bayous, bars, and islands from the mouth of the Missouri river to the southern boundary of said city."

Art. 1 sec. 2 of ordinance (Record p. 13). This is a distance of over twenty miles.

In the Inman Steamship Co. case this court used language which is in every sense applicable to the case at bar: "We think a clearer case of the imposition of a tonnage duty than is presented in the record before us can hardly be imagined. If the law had been passed by Congress instead of the State, and the charge imposed had been expressly designated, a *tonnage* duty, its character as such could not appear in a stronger light."

The charter of the city of St. Louis purported to authorize it "To charge and collect wharfage and tonnage dues." (See subdivision eighth, Record page 20), and it did by its ordinance attempt both these things, "to charge and collect wharfage" proper by Sec. 16, Art. V. (Record p. 18), and by Section 6, Article VI, (Record, p. 19) when a use of the wharf was actually contemplated and a proper charge or compensation was prescribed, but the city also attempted "to charge and collect tonnage dues" by sec. 30 of art I.

This part of the ordinance was unconstitutional and

void, and hence this suit to recover moneys so illegally exacted.

It is claimed by appellee that these regulations are necessary, and the Judges in the circuit court, in their opinions, presented arguments to show why the collection of wharfage was entirely proper and right.

We raise no issue upon this point in the present case, and to strip it of all complications we stipulated in the court below "that the sums so demanded and paid were reasonable compensation for the use of defendant's wharf, if defendant was entitled to collect any sums whatever under said ordinances and laws." Our views in reference to these exactions were very similar, in fact almost identical with the views expressed by this court in *Inman Steamship Company v. Tinker, 94 U. S., p. 244.* We say that wharfage regulations are vital to commerce. "They are indispensible to those engaged in that business. They fence out many evils, and promote largely the convenience and the welfare of those engaged in this field of enterprise. Perhaps it is hardly too strong language to say they are well nigh vital to commerce itself." * * * "But such charges must not be repugnant to the constitution of the United States. Any conflict is fatal to them."

If St. Louis can exact "tonnage dues" because it has furnished a wharf and certain facilities for river commerce for which it might, in some other form, have exacted compensation, then the provisions of the constitution may be evaded and set at naught by every city built upon navigable water.

Appellee's counsel claims, and the Judges in the

court below coincided with his views, that this was only a mode of measuring the compensation to be exacted.

Does seven and one-half cents *per ton* measure accommodations, or measure *the tonnage of a vessel?* If the ordinance had said "seven and one-half cents per front foot of wharf room actually occupied by the vessel," or "seven and one-half cents per day for each day that a vessel actually uses and occupies space at the wharf or landing," or "seven and one-half cents per ton or hundred tons of freight actually landed upon or received from the wharf," it would have been some kind of a measurement of the accommodations furnished and used. This ordinance measures the ship and assesses a tonnage duty by "custom-house measurement," and prescribes that "If the boat have no custom-house measurement, or if the harbor-master be not satisfied as to the correctness of said boat's custom-house measurement, he is hereby empowered and directed to ascertain the tonnage of said boat by measurement, according to the rules and regulations of the United States in the measurement of boats, and wharfage shall be collected according to such measurements." (Art. I, sec. 30. Record, p. 15.)

He is directed, not to ascertein the amount of accommodations furnished such boat, but "to ascertain the tonnage of said boat by measurement." The Inman Steamship Co. case seems to be directly in point, and to cover every feature of the case at bar, and to be a full and complete answer to the arguments advanced on behalf of the appellee; but there are other

cases decided by this court that are equally decisive of the points involved.

The case of *Cannon v. New Orleans, 20 Wallace, 577*, in all its facts, was like the case at bar. A comparison of the provisions of the two ordinances will show how nearly alike they were in their terms:

New Orleans Ordinance.

"From and after the 1st day of January, 1853, the levee dues on all steamboats which shall moor or land in any part of the port of New Orleans shall be fixed as follows: Ten cents per ton if in port not exceeding five days, and five dollars per day after said five days shall have expired; *provided*, that boats arriving and departing more than once in each week shall pay only seven cents per ton each trip."—*Cannon v. N. O.*, 20 *Wallace*, 378.

St. Louis Ordinance.

"Sec. 30. There shall be collected from each and every boat, of whatever kind or description, except such as are hereinafter excepted, for each and every time the same shall come within the harbor of said city, and land at any wharf or landing, or be made fast thereto, or to any boat thereto fastened, or shall receive or discharge any freight or passengers in this city, or shall tow coal or any other article in the harbor, seven and one-half cents for each ton of said boat's burden, by custom-house measurement, as wharfage."—*Record, pp.* 14 and 15.

From the report of the New Orleans case it does not appear where the landings of the Steamboat R. E. Lee were actually made, nor do we know whether there was any evidence upon that point before this court: but as a matter of fact, we do know that her usual and ordinary place of landing was at the foot of Canal street at the most expensive wharf structure on the Mississippi River, and we do not think under that ordinance that it was material, for the court says:

"We are of opinion that upon the face of the ordinance itself, as applied to the recognized condition of the river and its banks within the city, the dues here claimed cannot be supported as a compensation for the use of the city's wharves, but that it is a tax upon every vessel which stops, either by landing or mooring, in the waters of the Mississippi River within the city of New Orleans, for the privilege of so landing or mooring."

In this view of the subject, as the assessment of the tax is measured by the tonnage of the vessel, it falls directly within the prohibition of the Constitution, namely: "that no State shall, without the consent of Congress, lay any duty of tonnage." Whatever more general or more limited view may be entertained of the true meaning of this clause, it is perfectly clear that a duty or tax or burden imposed, under the authority of the State, which is, by the law imposing it, to be measured by the capacity of the vessel, and is in its essence a contribution claimed for the privilege of arriving and departing from a port of the United States, is within the prohibition." *20 Wallace, 581.*

On the authority of *Cannon v. New Orleans* this cause should be reversed.

There is one other reported case, brought by the Appellant, which is in every sense on the same footing with the case at bar, except that the provisions of the ordinance therein drawn in question were not so broad and its violation of the inhibition of the provisions of the constitution against "tonnage dues" were not so glareing. It is the case of *Northwestern Union*

Packet Company (Appellant) against The City of St. Paul, reported 3d Dillon, 454.

That was the test case brought by this Company to recover wharfage paid under a printed form of protest (the same as that used in this case, and which will be discussed later in the argument). The ordinance of St. Paul provided "That every steamboat or other vessel which may land or anchor at or in front of any landing, wharf or pier within the limits of the City of St. Paul shall for each and every trip be charged and shall pay the City of St. Paul the sum of four and a half cents per ton for each and every ton such steamboat or other vessel may register or measure; *Provided* that no boat shall pay more than twenty dollars for each trip, and all boats may remain at the wharf, landing or pier three days from the date of her arrival without extra charge; *Provided* said boat or other vessel does not interfere with the landing or departure of any other vessel."

The case was tried by Judge Nelson, sitting as Circuit Judge, but at the term when he announeed his decision Justice Miller was present and concurred in this decision.

It has also been referred to approvingly in the case of *Keokuk v. The Keokuk Northern Line Packet Co. 95 U. S. 86.*

In that case it was stipulated that the City of St. Paul owned the landings, wharves or piers referred to in the ordinances, and that she had improved and kept and maintained them in good repair as a landing and levee. It was conceded on trial that all the landings of plaintiff's vessels charged for were actually made at

the foot of Jackson street *at an improved wharf*, built and maintained by the City at great expense (the proof showing that it cost over $100,000), and that the boats made use of the improvements so furnished by the city, and that the compensation was reasonable if the city was entitled to collect any sums under the ordinance.

The court held the ordinance invalid, and gave judgment for the recovery of the sums claimed, and no appeal was taken. This suit and many others against various cities from New Orleans to St. Paul were shortly thereafter instituted to recover sums aggregating over $50,000, illegally exacted from one small steamboat company in two years under the guise of wharfage. This is the first one of those cases to reach this tribunal, and therefore may be considered a test case. It involves to a certain extent the interests of commerce for the entire valley of the Mississippi.

We do not ask any other or different ruling or construction than that laid down in *Cannon v. New Orleans, Inman Steamship Co. v. Tinker, and Northwestern Union Packet Co. v. St. Paul.* If those cases have not been misunderstood, then the case at bar is clearly a case where there is an attempt to exact a "tonnage duty."

This case is clearly distinguishable from *Keokuk v. The Keokuk, Northern Line Packet Company*, reported in 95 U. S. 80; on page 89 of the opinion, it is said, "The record shows that the wharfage charged to these plaintiffs in error, was for the use of a wharf, built, paved and improved by the city at large expense. So far as the ordinance imposes and regulates

such a charge, it is not obnoxious to the accusation that it is in conflict with the constitution."

The Saint Louis ordinance does not purport to be a charge for any such purpose.

Further on, the Court says, "The ordinance of Keokuk has imposed no charge upon these plaintiffs, which it was beyond the power of the city to impose. To the extent to which they are affected by it, there is no valid objection to it. Statutes that are constitutional in part only, will be upheld so far as they are not in conflict with the constitution, provided the allowed and prohibited parts are severable. We think a severance is possible in this case. It may be conceded that the ordinance is too broad, and that some of its provisions are unwarranted."

It will be quite difficult we think to point out what *part* of section 30, art. I, of the St. Louis ordinance, is constitutional.

If the "allowed and prohibited parts are severable," there can be no doubt that the *prohibited parts* is that which levies a "duty of tonnage," according to custom-house measurement, and if that part is unconstitutional, then the various sums thereunder exacted, were illegally exacted, and should be refunded to appellant.

The counsel for appellee is driven to the argument that this ordinance, when it prescribes seven and one-half cents per ton, simply uses the tonnage of the vessel as a convenient mode of measuring the services rendered; but we challenge him to point out anywhere in sec. 30, language that confines or attaches this

charge to any services rendered or any facilities afforded.

It is for coming within the harbor, (a stretch of twenty miles of river,) and landing at any wharf or landing, or being made fast thereto, or to any boat thereto fastened, or for receiving or discharging any freight or passengers in the city, or for towing in the harbor.

If a boat comes below the mouth of the Missouri with barges in tow, and ten miles above the paved wharf or at any other point, turns about, continuing to tow, she is liable. If she floats down opposite the city, and sends her yawl to the shore with passengers, she is liable; if she receives passengers within the city limits, she is liable; if she has a tug come along side her with freight, or sends freight to the shore on a tug, she is liable.

There is no provision to charge for the use of the wharf and facilities afforded, whatever, save as the use may be implied by landing or making fast to a wharf or landing. That is just what this Court has repeatedly said could not be done.

The right to free navigation of the river has been guaranteed for all time by constitutional provisions, by treaties and by repeated congressional acts, and the right to free navigation, carries with it the right to land, not the right to land *and use wharves, piers, docks, &c.*, free of charge, but the naked *right to land.* In the case of *Tobin et al. v. Vicksburg*, (No. 148, Calender present term), Judge Hill says, "The right of plaintiffs to navigate the river with their vessels included the right to land at the banks, as required by

the necessities of the business in which they are engaged."

"The public interest is concerned in the protection of commerce vouchsafed by the constitution of the United States; and the law of any State or municipality interfering with or obstructing it in a manner prohibited should be unhesitatingly denounced as null and void by the courts. The ordinance, by its terms, imposes this tax for the privilege of *landing at the city of Vicksburg*, and not for the use of the city's wharves. It applies as well to a landing at the wharfboat or upon the private property of any citizen. The tax is imposed for the *privilege of stopping at Vicksburg*. To acknowledge the validity of such an ordinance would be to make the immense commerce which floats the Mississippi river the easy prey of all the towns and cities upon its banks."

Vol. IV. Central Law Journal, 280.

The exactions prescribed by the St. Louis ordinance amount to a regulation of commerce which is expressly reserved to Congress.

"What is commerce?" Chief Justice Marshall, in considering these very questions, remarks: "One-half the doubts in life arise from the defects of language," it will be well enough to get a clear conception of a word which embraces so much.

In the early history of the colonies, it meant but little, in comparison with what is now comprehended by a term which embraces to a greater or less extent, some part of the business of every citizen in a population of forty millions.

Chief Justice Marshall says: "The subject to be

regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but is undoubtedly something more; it is intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of another, and be confined to prescribing rules for the conduct of individuals in the actual employment of buying and selling, or of barter."

Gibbons vs. Ogden, 9 Wheaton, 189–90.

"Commerce, as defined by this court, means something more than traffic—*it means intercourse*, and the power committed to Congress to regulate commerce is exercised by prescribing rules for carrying on that intercourse."

Passenger Cases, Justice Grier's opinion, 7 How., 462.

"Before the constitution existed the States taxed the commerce and intercourse of each other. This was the leading cause of abandoning the confederation and forming the constitution—more than all other causes it led to the result, and the provision prohibiting the

States from laying any duty on imports or exports, and the one which declares that vessels bound to or from one State shall not be obliged to enter, clear or pay duties in another, were especially intended to prevent the evil. Around our extensive seaboard, on our great lakes, and through our great rivers, this protection is relied on against State assumption and State interference. Throughout the Union, our vessels of every description go free and unrestrained, regardless of State authority. They enter at pleasure, depart at pleasure, and pay no duties. Steamboats pass for thousands of miles on rivers that are State boundaries, not knowing nor regarding in whose jurisdiction they are, claiming protection under these provisions of the constitution. If they did not exist, such vessels might be harassed by unsupportable exactions. If it be the true meaning of the constitution that a State can evade them by declaring that the master may be taxed in regard to passengers, on the mere assertion that he shall have a remedy over against the passengers, citizens and aliens, and that the State may assess the amount of tax at discretion, then the old evil will be revived, *as the States may tax at every town and village* where a vessel of any kind lands" (as they attempt to do under these ordinances.) "They may tax on the assumption of self-defense or on any other assumption, and raise a revenue from others, and thereby exempt their own inhabitants from taxation."

Passenger Cases. — Mr. Justice Catron's opinion, 7 How., 445–6.

If the States have power to exercise control over commerce in this form, and tax every steamboat that

touches the shore within the limits of municipal corporrations, they can declare the entire shore within the limits of the state a wharf or landing, and force all commerce to pay tribute to the sovereign power of the state.

Another object in view by the framers of the constitution was to have all regulations of commerce and navigation uniform. Justice Greer says: "If the bays and harbors in the United States are so exclusively the property of the states within whose boundaries they lie, that the moment a ship comes within them, she and all her passengers become subjects of unlimited taxation before they can be permitted to *touch the shore*," (this is what the municipal corporations in these cases claim,) "the assertion that this is a question with which the citizens of other states have no concern, may well be doubted. If these states still retain all the rights of sovereignty, as this argument assumes, one of the chief objects for which this Union was formed has totally failed, and "we may again witness the scene of conflicting commercial regulations and exactions which were so destructive to the harmony of the States and fatal to their commercial interests abroad."

Passenger Cases, 7 Howard, 461 and 462.

"*I lay down the broad proposition that by no device or evasion, by no form of statutory words, can a State compel citizens of other States to pay to it a tax, contribution or toll, for the privilege of having goods transported through that State by the ordinary channels of commerce.* And that this was the purpose of the framers of our constitution, I have no doubt; and I have

just as little doubt that the full recognition of this principle is essential to the harmonious future of this country now, as it was then. The internal commerce of that day was of small importance, and the foreign was considered as of great consequence. But both were placed beyond the power of the States to control. The inter-state commerce to-day far exceeds in value that which is foreign, and it is of immense importance that it should not be shackled by restrictions imposed by any State in order to place on others the burden of supporting its own government, as was done in the days of the helpless confederation."

State Tax Case. Dissenting Opinion, Miller, Field & Hunt, 15 Wallace, 299.

If the ordinance of Saint Louis is not a regulation of commerce, affecting directly the instruments by which it is carried on, then we have misunderstood the purport and scope of decisions herein above extracted from and cited.

Saint Louis is the greatest commercial city in the valley of the Mississippi, and through her harbor the commerce of many States and nations pass and repass to and from the markets of the world. If coming within her harbor and landing at any of her wharves or landings, (without other use of them,) gives her the right to levy this tax, then the commerce of all this valley is at her mercy.

We may load a fleet of bulk barges with one hundred thousand bushels of Minnesota wheat at St. Paul, and attach to it a steam tug to propel it to New Orleans for transhipment, thence to Liverpool. It passes unobstructed till below the mouth of the Mis-

souri River, and within the city limits of St. Louis, when it is hailed by a city revenue cutter with the harbor master on board, who exhibits the ordinance of St. Louis, and says, you are "towing" within the harbor of St. Louis, pay me seven and one-half cents per ton, according to custom-house measurement of this entire fleet, and the master of the fleet wonld have to submit, or subject himself to arrest and fine in double the amount of the sums demanded.

Of course this is a glaring illustration of the tenor and effect of this ordinance, but if it is good for anything, it is good for the whole amount prescribed, even under the circumstances supposed.

Vessels loaded at Pittsburg wholly with freight for the upper Mississippi, and on a through trip to St. Paul, Minnesota, must pass through the harbor of St. Louis, and if they but stop to buy a few pounds of fresh meat or ice or some fresh milk, are subject to just the same tax, under this ordinance, as if they had stopped there, and unloaded cargo and received a new cargo. And yet it is contended that this charge was a compensation for facilities furnished. Where is the charge for those boats to which *no* facilities were furnished and which made *no* use of the improved wharf, but only touched or landed at a wharf boat lying along the levee front, and then pursued her voyage.

The difficulty is that the charge was "for landing," not for the use of a wharf.

The circuit court in its special findings found as follows:

"*Eighth*, That the sums so demanded and paid were reasonable in amount, and a reasonable compensation

for the use of defendant's wharf, if defendant was entitled to collect any sums whatever under said ordinances and laws." (Record p. 20.)

Treat J. says: "It would be a narrow view of the question to admit that wharfage is collectable, and to hold, at the same time, that the amount of wharfage dues is not collectable because that amount, though reasonable, is, instead of a sum certain upon every craft, adjusted to the size of the craft, to be ascertained by its tonnage. It may be conceded that no municipality can forbid the entry, anchoring or landing of a vessel engaged in foreign or inter-State commerce, unless it pays a tonnage duty for said privilege." (Record p. 23.)

The last sentence above is just what we contend for. The city of St. Louis demanded and collected the sums sued for because we entered the harbor and *landed* at her wharf, not for any use we ever made of her wharf, and that is the reason we stipulated that the compensation was reasonable, "if defendant was entitled to collect any sums whatever under said ordinances and laws." Now, if these boats used an improved wharf, the city might have exacted a reasonable compensation therefor by proper legislation, but the city can't charge our boats "*for landing*," and then say it was "*for use.*" The ordinance nowhere makes any charge "for use."

Suppose "A" is indebted to "B" $1000, and he gives his note therefor, and when it falls due it remains unpaid, "B" can sue and by proper proceedings collect the $1000, but instead of pursuing his legal remedy he finds "A" with a thousand dollars in

his possession. He at once assaults and overpowers "A," and takes the money from him by force. "A" brings a suit against "B" to recover the money so taken from him, and "B" defends on the ground that "A" justly owed him $1000, and that he has applied the $1000 to the payment of the debt. Would a court of justice allow such a defence to stand?

In the case at bar we will suppose that the appellant by its use of improved wharves, became indebted to St. Louis in the sums set out in the complaint. Without authority of law and in clear violation of the provisions of the constitution the appellee collected all those sums off appellant, and now when we bring this suit they answer, the Company used our wharves, and although we got this money illegally, we have applied it to the payment of a just claim which we had or might have had under proper legislation against that Company, and so in this suit, it should not recover.

Whoever heard that money obtained by highway robbery could be retained, if it was applied to the payment of a just debt due from the party robbed to the robber. That is the defence contended for in this suit, if the ordinance in itself is illegal and unconstitutional.

Dillon, J., in his opinion, says: "Unless, therefore, the ordinance of the city provides for a tax or duty on tonnage, it would seem to be free from any constitutional objection. This requires of boats landing or making fast to the wharf or landing, or receiving or discharging freights or passengers in the city, to pay five cents for each ton of the boat's burden, as wharfage dues. Other sections of the ordinance show that

the city does not demand wharfage dues for landing away from the improved wharf; and it is expressly agreed in this case that 'the boats of the plaintiff only landed at the improved wharf where accommodations existed therefor.' Under the facts of this case, the words of section 30, requiring wharfage dues from any boat which 'shall receive or discharge any freight or passengers in the city,' have no application, and it is not necessary to construe them in connection with other parts of the ordinance, nor to affirm their validity. As the plaintiff voluntarily used the improved wharf for its boats, and as it is admitted that the compensation therefor prescribed in the ordinance is reasonable, I am of the opinion that the ordinance is not invalid merely beçause it fixes and graduates the amount by reference to the tonnage or capacity of the boat." (Record, pp. 25, 26.)

The learned judge has applied the compensation to "thé use" of the wharf, while the ordinance exacted it for "landing." Because other sections of the ordinance show that when boats are away from an improved or paved wharf they are not charged, the inference is drawn that the charge exacted was "for the use" of such paved wharf.

That may have been the intention of the framer of the ordinance, but if so it has not been anywhere expressed. The exaction sought to be enforced against Cannon by New Orleans was doubtless intended to cover the use of an improved wharf, but the ordinance was so framed that it said "landing" or "mooring" in the harbor, and the court said the ordinance could not stand.

In the Inman Steamship Co. case this court plainly stated that steamships visiting the port of New York might be made liable for reasonable and proper port charges, but as to the manner of imposing those charges it declined to express any opinion. The court says: "The tax imposed is not merely a mode of measuring the compensation to be paid. The answer to this suggestion is, that it is exacted where there is nothing to be paid for, and has no reference to any circumstance in this connection but the tonnage of the vessel and the class to which it belongs." 94 U. S., p. 245.

So we claim in the ordinance under consideration the exaction "has no reference to any circumstance in this connection (section 30 of ordinance), but the tonnage of the vessel," and the fact that it enters the harbor and lands at some landing or wharf. If by any forced construction it can be applied to the use of a wharf, then the charge should be proportioned to the use, and not proportioned to the tonnage of the vessel. A boat of 500 tons burden may land at a wharf in St. Louis, and unload 500 tons of cargo on to the wharf and then receive 500 tons again from the wharf, and still pay but one-half of the amount that would be exacted from a boat of 1000 tons burden that merely landed at the same wharf, and did not receive or discharge a pound of freight, and did not remain over two minutes, and even if it only made fast to a wharf-boat fastened to the wharf. The absurdity of claiming that these sums were compensation for the use of a wharf is made glaring by such illustrations. Appellee claims to retain this money, not under the "letter of

the law," but by a "construction," and we ask that no construction other or different than that already announced by this court be given to the provisions of the constitution upon which we have relied for protection and for the recovery of this money. If we are right in assailing this ordinance as wholly unconstitutional and void, and this court shall so determine, then the only question remaining is that of

VOLUNTARY PAYMENT OR DURESS.

The protest under which all these payments were made is found on page 12 of the Record, and was prepared by appellant's counsel, with the tonnage tax cases, 12 Wallace, 209, before him, and that case is relied upon to authorize a recovery in this and other similar suits, if this court shall hold the ordinances under which collections were made unconstitutional.

The court said: "* * * * If the tax is illegal * * * and paid * * * under protest, or with notice that the party intends to bring a suit to test the validity of the tax, he may recover it back in such an action."

In this case both conditions were complied with, viz. "protest" and "notice that the party intends to bring suit to test the validity of the tax."

The plaintiff recognizes the rules laid down, generally, in the law books, in regard to voluntary payments and what constitutes *duress*, but relies on this principle: "*If there be a controlling necessity in the case arising from the peculiar circumstances, the rule does not apply.*"

On voluntary payments, see also *Amesbury Manufacturing Co. v. Amesbury, 17 Mass., 465.*

County of LaSalle v. Simmons, 5 Gilman Reports, pages 517,518,519.

If the mode of assessing renders the tax void, that is,if the entire ordinance in this case is unconstitutional, it will be impossible to distinguish the part that might justly have been exacted as compensation for the wharves under a differently worded ordinance, and to determine now what is just and what is not, and hence the entire tax must fall.

The impossibility of deciding what part of such exactions were legal and what were not would compel a judgment for the whole on the authority of *Libby v. Burnham, 15 Mass., 146.*

On the question as to whether these were voluntary payments or payments under compulsion of law, I cite and rely upon "*The Lafayette & Indianapolis R. R. Co. v. Pattison,*" *41 Indiana, 312.*

The case as reported presents a large amount of evidence which discloses the following facts as condensed from statements of the case by the Court.

Pattison, during the late rebellion, had a beef contract with the Government, which extended only two months.

He contracted with Raiload Company to ship cattle from Chicago to Indianapolis to fill his contract at $65 per car load.

When the first two car loads *had been delivered* to Pattison, the Railroad Company sent him a bill of $201.02, which he refused to pay. After some negotiations, he told the Railroad agent he would pay the

bill already presented, and for the balance of the cattle as they arrived, *under protest*. After which he paid the bills as presented, and then brought suit to recover the excess paid over the price agreed upon.

The Court says, "In our judgment, the money so paid can be recovered back on two grounds. In the first place, it was agreed and understood between the parties that the payment should not be regarded as a voluntary payment, and that the appellee should have the right to sue for and recover any money in excess of the just and legal freight; and the appellee having been thus induced to pay an unjust and illegal demand, the appellants ought to be and are estopped from alleging that the money was voluntarily paid."

"In the second place, (says the Court,) we are of opinion that the money so paid could be recovered back if there had been no valid agreement that it might be. While the appellants were not in the actual possession of the cattle of the appellee, they possessed such power and control over the shipment and delivery thereof as gave them *an undue advantage over the appellee, and the necessity of the appellee was so great and pressing as to deprive him of the freedom of his will.*"

* * * * "*The parties did not stand upon equal terms.* The appellee had to perform his contract with the government, or sustain not only loss of profit, but subject himself to damages. * * * There were six shipments of cattle, and if the appellee had resorted to the action of replevin he would have been compelled to have brought six separate suits.

To require this would have been unreasonable and oppressive."

In the St. Louis case there were about 300 separate payments of wharfage as shown by the complaint, and if the plaintiff had awaited actual arrest and contested each separate payment, he would have had that number of suits to defend instead of the one now pending. In the language of the Indiana case, "*To require this would have been unreasonable and oppressive.*"

On either of the grounds mentioned in the Indiana case, the plaintiff is clearly entitled to recover the full amount claimed.

It will not be pretended that there was any other remedy prescribed, save to submit to repeated arrests, and the full penalties of the ordinance.

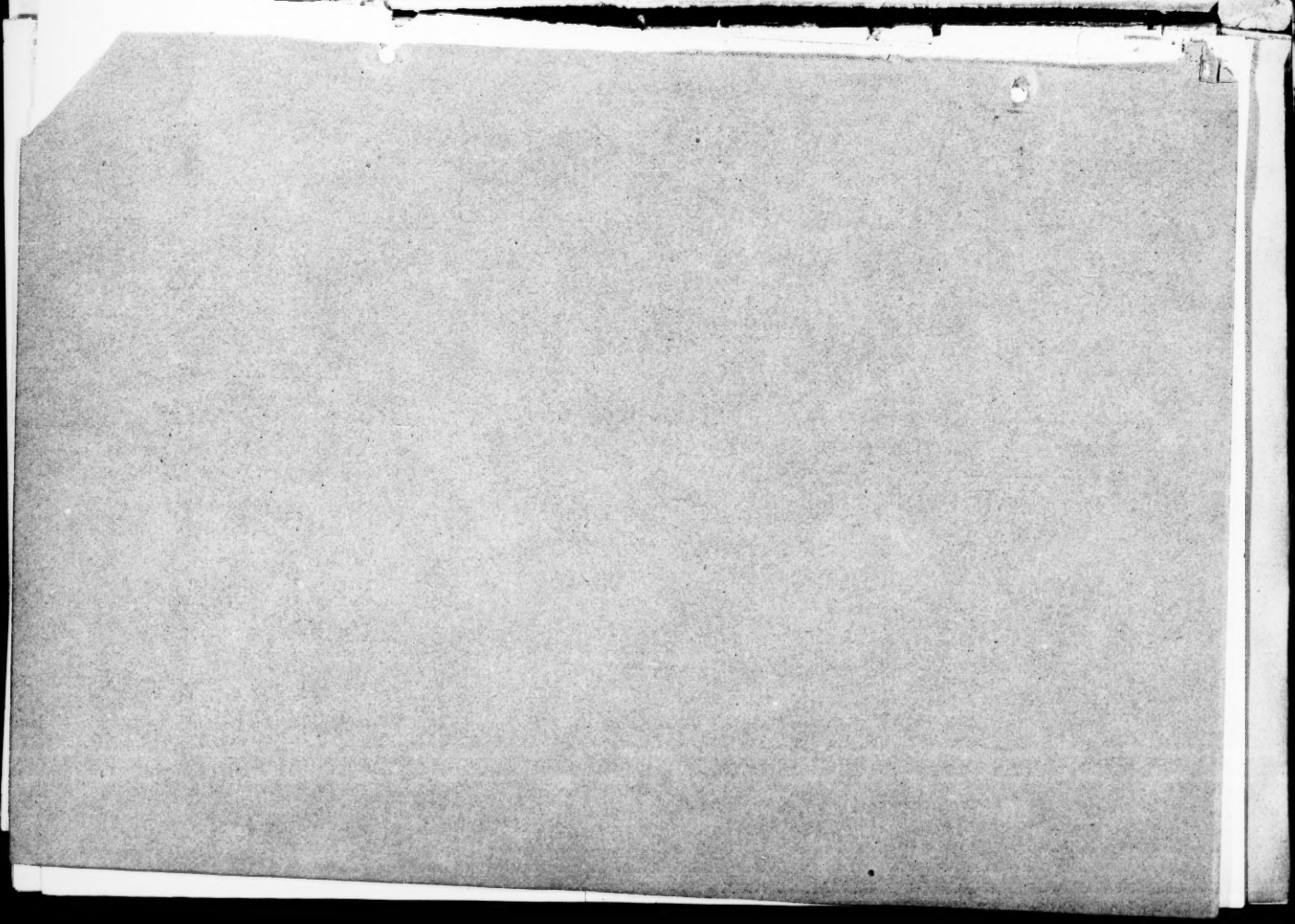
This point was not seriously contested in the Court below, and the decision being adverse to appellant, the Judges did not pass squarely upon this question. Judge Treat uses language which seems to indicate that if the tax was illegal there might be a recovery, (See Treats' opinion, Record, page 22).

Judge Dillon intimated a doubt upon the point, and says: "But as the counsel for the City does not press this point in the argument submitted, I pass it without decision, the more readily because the parties evidently desire a determination of the validity of the ordinance." (Dillon's Opinion, Record, page 24).

The Supreme Court of the United States has also expressed itself very emphatically on this question. "Taxes illegally assessed and paid may always be recovered back, if the collector understands from the payer that the taxes are regarded as illegal, and that

suit will be instituted to compel the refunding of them." *Erskine vs. Van Arsdale, 15 Wallace, 75.* Upon the facts which appear in this case and under the authorities above cited, we ask that the judgment of the circuit court be reversed, and the cause be remanded with instructions to enter judgment for appellant for the amount claimed in the complaint and interest.

JAMES H. DAVIDSON,
St. Paul, Minn., and
D. D. DUNCAN,
St. Louis, Mo., ~~Solicitors~~ Attys for Appellant.



IN THE

SUPREME COURT

OF THE UNITED STATES.

October Term, 1879.—No. 110.

THE NORTHWESTERN UNION PACKET CO.,
Plaintiff in Error.

vs.

THE CITY OF ST. LOUIS,
Defendant in Error.

STATEMENT AND ARGUMENT FOR DEFENDANT IN ERROR.

LEVERETT BELL,
For the Defendant in Error.

ST. LOUIS:
CHANCY R. BARNS, PRINTER, 215 PINE STREET.

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Statement.

This is an action to recover payments of wharfage, aggregating $5,751.35, made by the plaintiff in error to the city of St. Louis during the years 1870, 1871 and 1872, for the privilege of landing the steamboats of the plaintiff at the improved wharf of the city during said years. The payments in question were made by the plaintiff under protest, and were demanded and received by the defendant pursuant to an ordinance of the city of St. Louis,

which requires every boat landing at the wharf to pay wharfage at a given rate fixed upon the tonnage of the vessel. The ordinance specifies that no wharfage shall accrue against a boat unless it is landed at the paved wharf. (See sec. 35, page 15 of printed record.)

By the charter of St. Louis, the mayor and council are authorized to regulate by ordinance, the stationing, anchoring and mooring of vessels within the city, and charge and collect wharfage, and maintain and improve the wharf and harbor, and open and extend the wharf, and apply the net receipts from wharfage to the credit of the wharf funds. (Printed record, p. 20.)

The sums demanded and paid for wharfage were reasonable in amount and were fair compensation for the use of the defendant's wharf. The plaintiff's boats landed only at the improved wharf, where accommodations existed therefor. The defendant owned the property along the west bank of the river, and had improved and paved a part thereof for wharf purposes at a large expense, and was and is keeping the same in repair. (Printed record, page 20.)

There was a special finding of facts, upon which judgment was entered for the defendant, and thereupon a writ of error was duly sued out.

Argument.

The case is, in all respects, fully within the decision of this court in Packet Company vs. Keokuk, 95 U. S., p. 80,

and under authority thereof, it is respectfully submitted, the judgment below should be affirmed.

LEVERETT BELL,
for the defendant in error.